(18,139.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 310.

E. M. AYRES, PLAINTIFF IN ERROR,

vs.

JOHN H. POLSDORFER AND WIFE, LOUISA M. POLSDORFER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the 6th Judicial Circuit, Cincinnati, Ohio.

John H. Polsdorfer et ux.,

vs.

J. C. Marley et al.

} 3491.

Agreement of Counsel.

In this cause it is hereby stipulated and agreed that the following matters in the transcript need not be printed in the transcript.

(1) The summons and returns thereon and cost bonds R. 6.

(2) The continuances, R. 10, 12, 13, and from 15 to 30, both inclusive.

(3) The map at page 189; and

(4) The maps, R. 38, 83, 97, 257, 352, 402 and 404, it is agreed, may be put into one volume of the printed transcript, being detached from the bill of exceptions and inserted in said printed transcript from the bill of exceptions. And may be referred to by counsel on the hearing of the cause before the court as a part of the record for the purposes of the appeal. This agreement is made subject to the rules of the court, and shall not have the effect of eliminating the maps from the record. If the maps can not be made parts of the record under the agreement, then the defendants in error insist upon their being printed with the rest of the record.

Randolph & Randolph,
For Polsdorfer.
C. W. Heiskell,
For Appellant.

United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May, November Terms, A. D.

1898-9, at the United States Court House, in the city of Memphis, in said District, to wit:

E. M. Ayres, Plaintiff in Error,

vs.

John H. Polsdorfer, Louisa M. Polsdorfer, Defendants in Error. } No. 3491.

C. W. Heiskell, of Memphis, Tennessee, attorney for plaintiff in error.

W. M. Randolph & Sons, of Memphis, Tennessee, attorneys for defendants in error.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

John H. Polsdorfer and Louisa M. Polsdorfer, his wife, Plaintiffs,

vs.

Joe C. Marley, Thos. Price, E. J. Roy, T. A. Roy, L. R. Colemen and E. M. Ayres, Defendants. } 3491.

Declaration filed October 15, 1898.

The plaintiffs, who are citizens of the State of Indiana, residing at Evansville, therein, complain of the defendants, Joe C. Marley, Thos. Price, E. J. Roy, T. A. Roy, L. R. Coleman and E. M. Ayres, who are citizens of the state of Tennessee, residing in the Western Division of the Western District thereof, in an action of trespass and ejectment.

For that heretofore, to wit, on October 1st, 1898, the plaintiffs were lawfully entitled in fee and were in possession of the following described property situated in the County of Lauderdale, in the said District, to wit, 2150 acres of land in the said county situated in the low lands of the Mississippi River above Fort Pillow and north of Cole Creek, bounded as follows, to wit:

Beginning at a cotton wood tree on the north bank of the Crutcher Lake, the southeast corner of an entry for 2650 acres, granted to M. M. Howard, and now owned by

Glass and Butler; and running thence south across Crutcher Lake 25 poles to the south edge of said lake to a willow with cotton wood and willow pointers; thence south 30 degrees west magnetic variation being north 5 1-2 degrees east 43 poles to the edge of the Heftright Slough, in all 150 poles to a stake in a sand bar; thence south 42 degrees east 810 poles to a stake at low water mark of the Mississippi River, and at the mouth of Cole Creek; thence north about 70 degrees east up said creek's center 150 poles to the mouth of Forked Lake slough; thence up said slough about north 50 degrees east 60 poles to a broken topped willow; thence north 40 degrees east 32 poles to a willow; thence north 30 degrees east 124 poles to a willow with willow pointers on the west edge of said slough; thence north 20 degrees east 82 poles to a willow with three willows in the west edge of a pond; thence north 5 degrees east 60 poles to three willows with willow pointers in the edge of Forked Lake; thence north 11 poles to a large cotton wood with willow and cotton wood pointers; thence north 10 degrees west 50 poles to a small cypress with willow pointers; thence north 45 degrees west 128 poles to a small ash, cottonwood pointer; thence north 53 degrees west 94 poles to a willow with cottonwood pointer; thence north 80 degrees west 45 poles to a small ash with two hackberry pointers; thence north 55 degrees west 28 poles to a cottonwood with two cottonwood pointers; thence north 73 degrees west 168 poles to a double maple with cottonwood and willow pointers; thence north 85 degrees west 70 poles to a small maple with maple and cottonwood pointers; thence south 82 1-2 degrees west 31 poles to a small crooked maple with ash and maple pointers; thence south 35 degrees west 16 poles to a maple with maple pointers; thence south 17 degrees west 54 poles to a stake at the north edge of Crutcher Lake; and thence north about 50 degrees west along the north edge of Crutcher Lake 300 poles to the beginning.

And also the following described land lying in the said County of Lauderdale, in the Mississippi River bottom above Fort Pillow and north of Cole Creek, and bounded as follows, to wit:

Beginning at a small maple with maple and cottonwood pointers a corner of an entry for 2150 acres, made in the name of Thos. Price; thence north 4 1-2 degrees west 8 poles to a stake in the south boundary line of an entry No. 24, made in the name of Wm. Woodfolk for 5,900 acres; thence west magnetic needle line with said

Woodfolk and Peal and Fletcher's line 123 3-5 poles to a stake in the east boundary line of a tract of land now claimed by L. A. Morris with elm, box elder and three maple pointers; thence south 4 1-2 degrees east with said Morris line 65 3-5 poles to an elm with pecan, elm and mulberry pointers on the north bank of Crutcher Lake; thence down the bank of said lake with its meanders to a stake in the edge of the lake at a point where the west boundary line of said Thos. Price's 2150 acres' entry strikes the same; and thence north and east with said Price's line to the beginning.

And also the following tract of land situated in the said County of Lauderdale, the same being an alleged island in the Mississippi River and the south end of said alleged island is near to and about north or perhaps west of north of L. R. Coleman's warehouse at Fort Pillow, in said county, and some hundreds of yards distant from the same, estimated to be from 300 to 500 yards distant, and bounded as follows:

Beginning at the southernmost point of said alleged island nearest to Fort Pillow; thence east and thence in a northwardly direction with a slough of the Mississippi River with the meanders of the said slough to the northernmost point of said island, being a mile more or less from the beginning point; thence around the head or north end of said alleged island with the meanders of its water line to the main channel of said river, and on southwardly with the meanders of the water line on the west and south sides of said island to the beginning.

All of the said property is of the value of exceeding $3,000.00. And the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to wit, on the said October 1st, 1898, at the said County of Lauderdale, unlawfully and without right entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do.

Wherefore the plaintiffs have been injured and damaged to the amount of $3,000.00, and they bring their suit for the recovery of the said lands and the said damages.

Wm. M. Randolph & Sons,
Attys. for Plaintiffs.

Circuit Court of the United States, Western District of Tennessee.

John H. Polsdorfer et al.,

vs.

Joe C. Marley et al.

Pleas.
No. 3191.

Filed Nov. 21, 1898.

The defendants, E. J. Roy and I. A. Roy, come, and for plea say they are not guilty of wrongfully withholding the premises from the plaintiffs claimed in the declaration.

Flippin & Newhardt,
Attys. for Defendants.

And the defendants, for further plea, say they are not guilty of cutting and removing the timber from lands of plaintiffs, as in the declaration alleged.

Flippin & Newhardt,
Attys. for Defendants.

The plaintiffs join issue in the above pleas.

Randolph & Randolph, Attorneys.

Circuit Court of the United States, Western District of Tennessee.

John H. Polsdorfer et al.,

vs.

Joe C. Marley et al.

No. 3191.

Plea of Thos. Price. Filed Nov. 21, 1898.

And now the defendant, Thos. Price, for plea, comes and says he is not guilty of wrongfully withholding the premises from plaintiffs which they claim in their declaration in this suit.

Flippin & Newhardt,
Attys. for Deft. Price.

And for further plea defendant, Thos. Price, comes and pleads he is not guilty of cutting and removing any timber from the lands of plaintiffs as they have alleged in their declaration.

Flippin & Newhardt,
Attys. for Price, Deft.

Plaintiffs join issue in above pleas.
Randolph & Randolph, Attys.

Circuit Court of the United States, Western District of Tennessee.

John H. Polsdorfer et al.,

vs.

Joe C. Marley et al.

No. 3491.

Disclaimer of Joe C. Marley. Filed Nov. 21, 1898.

And the defendant, Joe C. Marley, comes and disclaims all title to the property set forth and described in plaintiffs' declaration.

Flippin & Newhardt,
Attys. for Deft. Marley.

Circuit Court of the United States, Western District of Tennessee.

J. H. Polsdorfer et al.,

vs.

Joe C. Marley et al.

No. 3491.

Plea filed Decr. 5, 1898.

And now the defendant, Joe C. Marley, for further plea, comes and pleads he is not guilty of cutting and removing any timber at any time from the lands of plaintiffs, as they have in this declaration alleged.

Flippin & Newhardt,
Attys. for Defendants.

Plaintiffs join issue.
Randolph & Randolph, Attorneys.

Circuit Court of the United States, Western District of Tennessee.

John H. Polsdorfer et al.,

vs. } No. 3491.

Joe C. Marley et al.

Plea filed Jany. 9, 1899.

1. And now comes the defendant, E. M. Ayres, and for plea says he is not guilty of the matters in plaintiffs' declaration alleged.

2. And for further plea the defendant says that plaintiffs' action accrued more than seven years before suit brought.

C. W. Heiskell,
Attorney for Ayres.

Plaintiffs join issue in these pleas.
Randolph & Randolph, Attorneys.

United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D. 1899, at the United States Court House in the city of Memphis, in said District, on to wit, the 19 day of December, A. D. 1899, in the following cause, to wit:

J. H. Polsdorfer and wife, Plaintiff,

vs. } No. 3491.

Joe C. Marley, et al., Defendant.

This day came the plaintiffs, by their attorneys, and the defendants herein, by their respective attorneys, and comes also a jury of good and lawful men, to wit: W. G. Harvey, S. C. Gregory, C. P. Yates, A. M. Bowers, S. L. Wynne, B. F. Hardin, Dudly Jones, A. M. Applewhite, T. J. Barchus, W. J. Crawford, W. M. Morrison and M. T. Williamson, who were duly elected, empaneled, tried and

sworn well and truly to try the issues herein joined, and a true verdict render according to the law and evidence, when, for want of time, this trial is postponed until to-morrow.

No. 3491. Circuit Court of the United States, Western District of Tennessee. J. H. Polsdorfer et ux., vs. Joe C. Marley et al. Order of Court. Entered and filed 19 day of Decr., A. D. 1899. John B. Clough, Clerk.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

John H. Polsdorfer & Louisa M. Polsdorfer, his wife, Plaintiffs,

vs.

Joe C. Marley, Thomas Price, E. J. Roy, T. A. Roy, L. R. Coleman and E. M. Ayres, Defendants.

} Law Docket. No. 3491.

Verdict and Judgment, January 6, 1900.

Comes again the jury heretofore empaneled, and after hearing all the evidence, the arguments of the counsel of the respective parties, and the charge of the court, returns into court the following verdict:

That they find that the plaintiffs are the owners in fee and entitled to and in possession of the following lands, situated in Lauderdale County, Tennessee, to wit:

(1) A certain grant of land made by the State of Tennessee to W. W. Woodfolk, on the 28th day of July, 1837, by Grant No. 3245, and conveyed by said Woodfolk to the defendant, Joe. C. Marley, by deed recorded in the register's office of Lauderdale County, Tennessee, in Book J., pages 137-139, bounded and described in the said grant as follows, to wit: Beginning at a hackberry marked "W," hackberry and elm pointers in the Mississippi Bottom, above the mouth of Coal Creek, 260 poles north from the northeast corner of Occupant Entry No. 2, in the name of Thomas Peal and Moses Fletcher, for 400 acres; thence south to their northeast corner and with their east boundary line, in all 420 poles, to a stake on the bank of the main channel of the Mississippi River; thence

down the channel of the river with its meanders 640 poles to a stake on the bank of the main channel, 45 poles west of 2560 acres entered in the name of the heirs of Robt. Turner, Entry No. 798; thence east 45 poles to the northeast corner of the same, to an elm, ash and hackberry, marked "W"; thence south with their line 170 poles to a pecan and two cotton woods marked "W," I. J. Pinson's northwest corner of mill claim for 100 acres, Entry No. 11; thence east with his line passing his northeast corner, and running on the north boundary line of A. W. Kidd, Occupant Entry No. 23, in all 225 poles to his northeast corner, on a cypress, elm, maple and hawthorn pointers; thence south with his line 8 poles to a stake, and cypress and elm and two cypress pointers, Hugh Leiper's northwest corner of his Occupant Entry No. 22, for 160 acres; thence west with his line, passing his northeast corner, and running with the north boundary line of John Vasser's Occupant Entry No. 21 for 200 acres, 275 poles to its northeast corner, and in the west boundary line of the East Tennessee College 640 acres, Entry No. 773, on a red oak poplar and red oak pointers; thence north with said entry passing its northwest corner, and running on the west boundary line of Coleman Hutcherson's Occupant Entry No. 24 for 154 acres, to his northwest corner, in all 133 poles, to a stake in Goose Pond; thence east with his line 120 poles to a sycamore, red oak and mulberry pointers, it being the southwest corner of Wm. Gray's Occupant Entry No. 25 for 200 acres; thence north with his line 155 poles to his northwest corner in a small pond; thence east 220 poles to his northeast corner on a dogwood and two dogwood pointers in Louis Hutcherson's west boundary line of his Mill Entry No. 27, for 100 acres; thence north with his line passing his northwest corner, and running on the west boundary line of Mill Entry No. 28, for 100 acres, in the name of Hutcherson, in all 180 poles, to his corner on a sweetgum; thence E. with his line 100 poles to the west boundary line of Grant No. 297 for 5000 acres to John Rice; thence north with his line 420 poles to a cottonwood and hackberry marked "W"; thence west 670 poles to a stake on the east boundary line of Entry No. 1576 for 164 acres, made in the name of Scott Gray; thence south with his line 40 poles to his southeast corner; thence west 190 poles to his southwest corner; thence north with his line 40 poles to a stake; thence west 550 poles to the beginning, including and excluding Entry No. 1568 for 500 acres, made in the name of Fre lerick Harget, containing 5000 acres; together with all the appurtenances and accretions and hereditaments to the same belonging.

(2) And also a certain other tract of land situated in Lauderdale County, Tennessee, beginning at a stake in Coal Creek, where the said creek crosses the east boundary line of Entry No. 798, in the name of the heirs of Robert Turner, of which this is a part, for 2560 acres; thence north to the northeast corner of said entry; thence west to the northwest corner of the same; thence down the Mississippi River to the mouth of Coal Creek; thence up said creek with the center of the channel to the beginning, it being that part of said heirs of Robert Turner entry which lies north of Coal Creek, and a part of the tract purchased by Thomas Price and Joe. C. Marley, sold under decree of the Chancery Court at Ripley, Tennessee, and containing 400 acres, more or less; together with the accretions and alluvion formed in front of the same.

(3) And also a certain other tract of land, being in the Fourth Civil District of Lauderdale County, Tennessee, and a part of the Fort Pillow tract, and bounded as follows, to wit: Beginning in the west boundary line of the Hotchkiss tract at a hornbeam marked "M," with white oak and dogwood pointers, on the top brink of Coal Creek Bluff; thence north with the Hotchkiss west boundary line to center of Coal Creek; thence down said creek with its meanderings to the main channel of the Mississippi River; thence down the main channel of the said river to willow marked "M," on the bank of said river, with willow pointers; thence east to an elm marked "M," with a locust pointer, standing on brink of the bluff, near the old fort, or near the breastworks or lower corner of the old fort; thence in an easterly direction with the brink of the bluff to the beginning (this last line to be so run as not to interfere with the cleared land on the bluff), containing about 15 acres, be the same more or less; being the same land conveyed to the said Marley and Joseph and H. E. Price, by deed recorded in Book W, pages 473-474, register's office of Lauderdale County, Tennessee.

They also further find that the plaintiffs are the owners in fee, and entitled to all the accretions and alluvion formed by the Mississippi River in front of the said three (3) tracts of land above described, the same being and constituting all the land added by accretion and alluvion to the river front, as such front of the said three tracts of land existed on the Mississippi River when the said tracts of land respectively were granted, and extending from and including all the accretions and alluvion in front thereof, from the line on the river of the tract first mentioned above, furthest up stream, to wit:

The line beginning at a stake on the bank of the main channel of the Mississippi River as it existed in the year 1837, the same being the beginning point mentioned in the description of the tract first above described, to wit: Beginning at a hackberry marked "W," hackberry and elm pointers in Mississippi bottom, above the mouth of Coal Creek two hundred and sixty (260) poles north from Northeast corner of occupant entry No. 2, in the name of Thomas Peal and Moses Fletcher, for four hundred (400) acres; thence south to their northeast corner, and with their east boundary line in all four hundred and twenty (420) poles to a stake on the bank of the main channel of the Mississippi River, the point of beginning; thence from the said stake in a direct line to the thread of the main channel of the Mississippi River as it exists to-day, and at right angles thereto, and so as to run as nearly as practicable at right angles with the present course of the said river; thence down the thread of the main channel of the said river, with its meanderings, to the line furthest down stream of the third mentioned of the above three tracts of land from the said beginning point, to wit: To the point where a direct line extended from the thread of the main channel of the said river, and at right angles thereto, to the willow marked "M" on the bank of the river, with willow pointers, the corner furthest down the river of the said tract thirdly above described, would intersect such thread of the main channel of the Mississippi River; and thence eastwardly along the said line to the said willow marked "M," and embracing all the land between said lines, from the river front of the said three tracts of land when originally granted, to the thread of the main channel at present of the Mississippi River.

As to the other land herein sued for, not embraced in the above descriptions, the jury finds the plaintiffs are not entitled to the same.

It is therefore considered, ordered and adjudged, that the plaintiffs do have and recover of and from the defendants severally the lands hereinbefore described, found by the verdict of the jury to belong to them in fee, and that the plaintiffs do have and retain the possession of such lands under and in accordance with their said title; and that as to the lands herein sued for, not embraced by the verdict of the jury in favor of the plaintiffs, the defendants go hence without day; and that the plaintiffs recover of the defendants all their costs herein expended, and that execution issue therefor. No costs are adjudged against the defendants, E. J. and T. A. Roy, as

they have not set up any claim to the lands recovered by the plaintiffs, and the plaintiffs will pay the costs as to them, for which execution may issue.

United States of America, Western Division of the Western District of Tennessee.

In the Circuit Court of the United States, within and for the Wesern Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D. 1899, at the United States Court House in the City of Memphis, in said District, on to wit, the 11th day of January, A. D. 1900, in the following cause, to wit:

J. H. Polsdorfer and wife, Plaintiff,
vs. No. 3491.
Joe. C. Marley, and others, Defendants.

Came again the parties to this cause by their respective attorneys when the defendants by their respective attorneys move the court for a new trial of this cause which motion for satisfactory reasons to the court appearing is hereby refused and a new trial of this suit denied.

No. 3491. Circuit Court of the United States, Western District of Tennessee. J. H. Polsdorfer, et al. vs. Joe. C. Marley, et al. Order of Court. Entered and filed 11th day of Jany., A. D. 1900. John B. Clough, Clerk.

Circuit Court of the United States, Western District of Tennessee.

J. H. Polsdorfer, et ux.,
vs. No. 3491.
J. C. Marley, Thos. H. Price, T. A. Rey, E. J. Roy and E. M. Ayers.

Bill of Exceptions, filed March 9, 1900.

The following evidence was introduced:

Plaintiff's Evidence.

1. The government map of 1881-1885 being the map on page 6 of the Mississippi river showing the locus in quo and the surroundings.

2. A grant from the state of Tennessee to W. W. Woodfolk, of date July 28, 1837, as follows:

State of Tennessee to Wm. W. Woodfolk.

Grant for 5000 acres of Land.

State of Tennessee, No. 3245.

To all to whom these presents shall come—Greeting:

Know ye that by virtue of certificate No. 3565 issued by the secretary and commissioners of West Tennessee to George W. Levier for 5000 acres of land and by virtue of entry No. 24 dated January 28, 1837, in Lauderdale County, Eleventh Surveyor's District in the name of Wm. W. Woodfolk, assignee of George W. Levier for 5000 acres of land there is granted by the State of Tennessee unto Wm. W. Woodfolk a certain tract or parcel of land containing 5000 acres by survey bearing date January 30, 1837, situated in the range 5 and section 9: Beginning at a hackberry marked W. hackberry and elm pointers in the Miss. bottom above the mouth of Cole creek, 260 poles from the northeast corner of occupant entry No. 2, in the name of Thos. Peale and Moses Fletcher for 400 acres; thence south to their northeast corner and with their east boundary line in all 420 poles to a stake on the bank of the main channel of the Miss. river; thence down the river with its meanders 640 poles to a stake on the bank of the main channel 45 poles west of the northeast corner of 2560 acre entry No. 798, made in the name of the heirs of Robt. Turner; thence east 45 poles to the northeast corner of the same to an elm, ash and hackberry marked W.; thence south with their line 170 poles to a pecan and two cottonwoods marked W. I. I. Pinson's northwest corner of a mill claim, 100 acres, entry No. 11; thence east with his line passing his north corner and running on the north boundary line of A. W. Kidd's occupant entry No. 23 in all 225 poles to his north corner and a cypress, elm, maple and hawthorn pointers; thence south with his line 8 poles to a stake and cypress, two cypress and elm pointers, Hugh Leoper's northwest corner of his occu-

pant entry No. 22 for 16 acres; thence east with his line passing his northeast corner and running with the north boundary line of John Vasers' occupant entry No. 21, for 200 acres 275 poles to its northeast corner and in the west boundary line of the East Tennessee College, 640 acre entry No. 773 on a red-oak, poplar and red-oak pointers; thence north with said entry passing its northwest corner and running on the west boundary line of Callman Hutcherson's occupant entry No. 24, for 154 acres to his northwest corner, in all 133 poles to a stake in Goose pond; thence east with his line 120 poles to a sycamore, red-oak and mulberry pointers, it being the southwest corner of Wm. Grayes' occupant entry No. 25, for 200 acres; thence north with his line 155 poles to his northwest corner in a small pond; thence east 220 poles to his northeast corner on a dogwood and 2 dogwood pointers in Lewis Hutcherson's west boundary line of his mill entry No. 27, for 100 acres; thence north with his line passing his northwest corner and running on the west boundary line of a mill entry No. 28, for 100 acres in the name of Hutcherson, in all 180 poles to his corner on a sweetgum; thence east with his line 100 poles to the west boundary line of grant No. 297 for 5000 acres to John Rice; thence north with his line 420 poles to a cottonwood and hackberry marked W; thence west 670 poles to a stake on the east boundary line of entry No. 1576 for 164 acres made in the name of Scott Gray; thence south with his line 40 poles to his S. E. corner; thence west 190 poles to his S. W. corner; thence north with his line 40 poles to a stake; thence west 550 poles to the beginning including and excluding entry 1568 for 500 acres made in the name of Frederick Harget, with the hereditaments and appurtenances.

To have and to hold the said tract or parcels of land with the appurtenances to the said Wm. W. Woodfolk and his heirs forever.

In witness whereof Newton Cannon, governor of the State of Tennessee doth hereunto set his hand and caused the great seal of the state to be affixed at Nashville on the 28th day of July in the year of our Lord one thousand eight hundred and thirty-seven and of the independence of the United States the 61st.

N. Cannon.

(L. S.) By the Governor,
Luke Lea, Secretary.

Presented for registration on the 30th day of May, 1899, at 2:10 o'clock a. m.

John E. Walker, Register.

I, J. Monroe Garrett do hereby certify that the above and foregoing is a true copy of a grant for 5000 acres of land from the State of Tennessee to Wm. W. Woodfolk as the same appears and remains of record in my office in book, I. I., pages 524-5 and 526.

Witness my hand at office in Ripley, Tennessee, this 27th day of May, 1899.

(Rev. Stamp, 10 c.) J. Monroe Garrett, Register.

3. A deed from W. W. Woodfolk to J. C. Marley of February 5, 1867, as follows:

Deed: No. acres not known.

William W. Woodfolk to Jo. C. Marley.

This indenture made this 5th day of February, 1867, between William W. Woodfolk of the County of Davidson and State of Tennessee of the one part and Jo. C. Marley of the County of Lauderdale and state aforesaid of the other part witnesseth that the said W. W. Woodfolk for and in consideration of the sum of eleven thousand dollars to him paid the receipt whereof is hereby acknowledged that bargained, sold, conveyed and by these presents do bargain, sell, grant, convey and confirm unto the said Jo. C. Marley, his heirs and assigns forever certain tracts or parcels of land situate in the counties of Lauderdale and Obion, State of Tennessee, to wit, one five thousand acre tract of land lying on the bank of the Mississippi river in the County of Lauderdale, Tennessee, granted by the State of Tennessee to said Woodfolk on the 28th, July, 1837, by grant No. 3245; also one twenty acre tract in said County of Lauderdale near Fulton granted to said Woodfolk by the State of Tennessee by grant No. 3743 on 9th day of October, 1838; also one other tract or parcel of land in said County of Lauderdale, State of Tennessee containing about two thousand acres be the same more or less, lying on the waters of Cane creek and Cole creek bluff bounded as follows: to wit: Beginning at two dogwoods on the north side and near the bluff road leading from Ripley to Fulton, running thence west 226 poles to a stake; thence south 114 poles to said Woodfolk's line of his 600 acre tract; thence west 137 poles to a stake; then south to the northeast corner of his 75 acre tract; then west 100 poles; then south 118 poles to a stake in his 270 acre tract; then west 90 poles to its corner; then south 54 poles to the northeast corner of a 12 acre tract; then west 31 poles to its corner; then south 62 poles to the line of a

56 acre tract; then west 49 poles to its corner; then south 112 poles to the north boundary line of a 286 acre tract; then west 160 1-5 poles to its corner; thence south 260 poles to the north boundary line of his 480 acre tract; then west 8 poles to its corner; then south 300 poles to a stake; thence east 129 1-5 poles to a stake; then south 80 poles; then east 100 poles to Crawford and Perdon's line; then north with their line 640 poles to an ash, their corner; then east with their line 190 poles to a dead oak; thence north 228 poles to a poplar; then east 234 poles; then south 86 poles; thence east 120 poles; then south 10 poles; then east 109 poles; then north 238 poles then west 100 poles; then north 114 poles to the beginning. Also one other tract of land lying on the Mississippi river adjoining the Kentucky line not far above Island No. 10 in the County of Obion, State of Tennessee which was granted to said Woodfolk by grant No. 5499 by State of Tennessee and dated the 21st day of August, 1846, containing 1805 acres of land, be the same more or less, reference being had to the calls mentioned in the aforesaid grants the boundaries will fully appear. And also one other tract of land lying on the Mississippi river near the foot of No. 14 bend in said County of Obion, State of Tennessee, adjoining Robert Naut's 2560 acre tract on the west and Loree and Hargett's 800 acre tract on the north; beginning at the lower corner of a 30 acre tract, running thence down the river to Loree and Hargett's upper corner; thence east 438 poles to the west boundary line of said Naut's tract; thence north with his line 288 poles to the river; thence down the river to the beginning containing 320 acres of land, be the same more or less, granted to said Woodfolk by the State of Tennessee, excluding and including two small tracts.

To have and to hold the aforesaid several tracts of land with all and singular the hereditaments of, in and to the same belonging or in anywise appertaining to the said Jo. C. Marley, his heirs and assigns forever. And the said W. W. Woodfolk for himself, his heirs, executors and administrators doth covenant and agree to and with the said Jo. C. Marley his heirs and assigns that the before recited lands and bargained premises he will warrant and forever defend against the right, title, interest or claim of all and every person whomsoever.

In witness whereof the said W. W. Woodfolk doth hereunto set his hand and seal this day and date above written.

(Int. Rev. $11.00.) W. W. Woodfolk. (Seal.)

State of Tennessee, Lauderdale County.

Personally appeared before me George Johnson, Clerk of the County Court of County, William W. Woodfolk the within named bargainor with whom I am personally acquainted and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand at office this 5th day of February, 1867.

(State tax $11.00.) George Johnston, Clerk.
(Received.) By William E. Lynn, D. C.

Presented for registration the fifth day of February, 1867, at 9 o'clock a. m.

John D. Baxter, Register.

State of Tennessee, Lauderdale County.

I. J. Monroe Garrett, register of aforesaid county do hereby certify that the above and foregoing is a true and correct copy of a deed, W. W. Woodfolk, grantor and Jo. C. Marley, grantee as the same appears and remains in my office at Ripley in Book J, pages 137-8 and 139.

Witness my hand at office this 30th day of May, 1899.
J. Monroe Garrett, Register. (10 c. stamp.)

4. Agreement between J. C. Marley and Thomas H. Hobbs, of date November 7, 1887, as follows:

Agreement, J. C. Marley to Thos. H. Hobbs.

State of Tennessee, Lauderdale County.

This agreement made and entered into by Jo. C. Marley and Thos. H. Hobbs, both of Lauderdale County, State of Tennessee on this the 7th day of November, 1887, witnesseth that the said Jo. C. Marley is the owner of the following described tract of land, to wit: Tract situated in the 5th Civil District of Lauderdale County, State of Tennessee in range 5, section 9 beginning at a Hackberry marked W. hackberry and elm pointers in Mississippi bottom above the mouth of Coal creek 260 poles north from northeast corner of occupant entry No. 2 in the name of Thomas Peel and Moses Fletcher for 400 acres; thence south to their northeast corner and with their east boundary line in all 420 poles to a stake on the bank of the main channel of the Mississippi river; thence down the river with its meanderings 640 poles to a stake on the bank of the main channel 45 poles west of the northeast

corner of 2560 acres entry No. 798 made in the name of the heirs of Robt. Turner; thence east 45 poles to the northeast corner of the same to an elm, ash and hackberry marked W.; thence south with their line 170 poles to a pecan and two cottonwood marked W. to I. J. Pinson's northwest corner of a mill claim for 100 acres entry No. 11; thence east with his line passing his northeast corner and running on the north boundary line of A. W. Kidd's occupant entry No. 23 in all 225 poles to his northeast corner on a cypress, elm, maple and hawthorn pointers; thence south with his line 8 poles to a stake and a cypress, two cypresses and elm pointers and Hugh Leeper's northwest corner of his occupant entry No. 22 for 162 acres; thence east with his line passing his northeast corner and running with the north boundary line of John Vasser's occupant entry 21 for 200 acres 275 poles to its northeast corner and in the west boundary line of the East Tennessee College 640 acre entry No. 773 on a red-oak, poplar and red-oak pointers; thence north with said entry passing its northwest corner running on the north boundary line of Coleman Hutcherson's occupant entry No. 24 for 154 acres to his northwest corner, in all 133 poles to a stake in Goose pond; thence east with his line 120 poles to a sycamore, red-oak and mulberry pointers, it being the southwest corner of Wm. Gray occupant entry No. 25 for 200 acres; thence north with his line 155 poles to his northwest corner in a small pond; thence east 220 poles to northeast corner on a dogwood and 2 dogwood pointers in Lewis Hutcherson's west boundary line of his mill entry No. 27 for 100 acres; thence north with his line passing his northwest corner and running on the west boundary line of a mill entry No. 28 for 100 acres in the name of Hutcherson in all 180 poles to his corner on a sweetgum; thence east with his line 100 poles to the west boundary line of grant No. 297 for 5000 acres to John Rice's; thence north with his line 420 poles to a cottonwood and hackberry marked W.; thence west 670 poles to a stake on the east boundary line of entry No. 1576 for 164 acres made in the name of Scott Craig; thence south with his line 40 poles to his S. E. corner; thence west 190 poles to his S. W. corner; thence north with his line 40 poles to a stake; thence west 550 poles to the beginning, including and excluding entry No. 1568 for 500 acres made in the name of Frederick Hargett (now owned by Paul Kellar) and containing 5000 acres. The foregoing tract of land shall be referred to and described in this agreement as tract No. 1 (one).

The said Jo. C. Marley is also the owner of the following described tract of land lying in the Fourth Civil

District of Lauderdale county, state of Tennessee, it being a part of Fort Pillow tract, and is bounded as follows, to wit: Beginning in the west boundary line of the Hotchkiss tract at a horn-beam marked M., with white-oak and dogwood pointers on the top brink of Coal Creek bluff; thence north with the Hotchkiss west boundary line to center of Coal Creek; thence down said creek with its meanderings to the main channel of the Mississippi river as existing to-day, and thence down the main channel of said river to willow, marked M., on the bank of said river with willow pointers; thence east to an elm marked M., with locust pointers standing on brink of bluff near the lower corner of the breastworks of the old fort; thence in an easterly direction with the brink of the bluff to the beginning (this last line to be so run as not to interfere with the cleared land on the bluff), containing about 15 acres, be the same more or less, being the same conveyed to said Marley by Joseph & H. E. Price, by deed, recorded in Book W, pages 473, 474, in Register's office of Lauderdale county. The foregoing tract of land shall be referred and described in this agreement as tract No. 2.

The said Jo. C. Marley and one Thomas Price, also a resident of this county, own the following described tract of land (each owning an individual one-half thereof), adjoining the above described tracts and described as follows: Beginning at a stake in Coal Creek where the said creek crosses the east boundary line of Entry No. 798 in the name of the heirs of Robert Turner, which this is a part for 2560 acres; thence north to the northeast corner of said entry, thence west to the northwest corner of the same; thence down the Mississippi river to the mouth of Coal Creek; thence up said creek with the center of the channel to the beginning; it being that part of said heirs of Robert Turner entry which lies north of Coal Creek and a part of the tract purchased by Thomas Price and Jo. C. Marley sold under decree of the chancery court at Ripley, Tennessee. The foregoing land shall be referred to and described in this agreement as Tract No. Three (3). The foregoing tracts of land form the basis of this contract Thomas H. Hobbs on his part pays to Jo. C. Marley two thousand dollars ($2000.00) in cash and executes his three several promissory notes of one thousand dollars ($1,000.00) each, payable to Jo. C. Marley 1st day of January, 1889, 1890 and 1891, bearing interest from date and also his note to Thomas Price for the sum of five hundred dollars ($500.00) due six months after date, bearing interest from date. Jo. C. Marley hereby agrees to convey to Thomas H. Hobbs tracts No. 2 and No. 3, whenever all of

said notes are paid and this contract in all of its terms is complied with, it being distinctly understood, however, that Thomas Price, the half owner of said tract No. 3, is not present and does not authorize the sale of his interest; it is believed, however, by the contracting parties that it will meet with his approbation, and in case the said Thomas Price approves this sale and executes a deed to Thomas H. Hobbs for his one-half of said tract of land No. 3, with 30 days from date of this instrument, the deed to contain the usual covenants, that is to say, a covenant of seizure, against incumbrance, a full right to convey and of general warranty, reserving a lien to secure said ($500.00) five hundred dollars note payable to Thomas Price in which event Thomas H. Hobbs agrees to accept said deed and to pay his note for five hundred dollars ($500.00) given as aforesaid; if, however, Thomas Price should fail or refuse to approve of the sale of his interest in said tract No. 3 within the time stipulated in the manner agreed upon then, and in that event, said five hundred dollars note payable to Thomas Price shall be by Jo. C. Marley immediately canceled and delivered up to Thomas H. Hobbs, and the title to the undivided half of tract No. 3 belonging to Thomas Price shall remain in him and this contract in all of its features in no way be affected by Thomas Price's refusal or failure, it being the intention of the contracting parties in that event to sell and purchase Jo. C. Marley's individual half in said tract No. 3, and the whole of said tract No. 2.

As a further consideration Jo. C. Marley hereby on his part agrees to give Thos. H. Hobbs the privilege and right of going upon said tract No. 1 and cutting, using and reserving any timber thereon that he may see proper to utilize. This agreement in this respect, however, to said Tract No. 1 is limited to six years from this date, that is to say, Thomas H. Hobbs shall have no right whatever under this contract in said Tract No. 1 after the expiration of said term of six years. It is further agreed as to said tract No. 1 at any time before the expiration of said term, Jo. C. Marley if he sees proper to do so shall have the right to fence and shall have the right to take enough timber for posts for fencing all of said tract or any portion thereof and use pasturage or for any other purpose; this provision, however, shall not interfere with Hobbs' right to cut and remove timber during his said term. It is also agreed as to said Tract No. 1 that at any time during said term Jo. C. Marley shall have the right on giving 30 days' notice to Thomas H. Hobbs to select any portion of said tract not greater than one hundred (100) acres and

require the timber to be taken off as herebefore agreed upon as to the whole tract within not less than twelve months from date of notice; should Jo. C. Marley exercise this right, the particular land by him selected shall be pointed out by metes and bounds and Thomas H. Hobbs hereby agrees in that event to move all the timber that he desires from said parcel within the time limited by the notification and consent to surrender all of his right under this contract as to the parcel so designated, leaving his contract, however, in full force as to the balance of said Tract No. 1. It is also understood that Jo. C. Marley has made contract in writing with Green H. Haslip, W. R. Warren and B. F. Fitzgerald, dated respectively, 7" day of February, 1887; 23" day of June, 1887, and 7" day of July, 1887, by which he gives said parties according to said written contracts the privilege of cutting timber on said Tract No. 1. These three contracts are fully understood by Thomas H. Hobbs and Jo. C. Marley, and Jo. C. Marley hereby transfers all his rights thereunder, it being agreed, however, that Thomas H. Hobbs shall diligently collect the amounts due from said parties under said contracts and immediately pay it over to Jo. C. Marley, and all amounts so collected and paid over shall be applied as a credit on the notes of Thomas H. Hobbs held by Jo. C. Marley as aforesaid, and on that one then first due. Thomas H. Hobbs accepts this contract as to the right to cut timber on Tract No. 1 with a full knowledge of Jo. C. Marley undertaking with the above named parties and his rights subservient to those of said parties. The boundaries of the three above described tracts of land are according to the original survey and as to the Tract No. 1 Jo. C. Marley thinks that it is substantially correct, but he does not by this contract bind himself that they are exact; should there be any conflict of lines he does not agree to protect Thomas H. Hobbs unless said conflict reduces said Tract No. 1 below 5,000 acres. The contract is that Jo. C. Marley warrants that said Tract No. 1 contains as much as (5000) five thousand acres. Should any conflict and encroachments of adjacent lands reduce Tract No. 1 below 5000 acres Jo. C. Marley agrees to credit Thomas H. Hobbs' notes with an amount equal to (84c.) eighty-four cents per acre of the number of acres so lost by said encroachment or conflict. As will be seen by the calls of said three tracts of land, the Mississippi river bounded them on the west for the most part. It is believed by gradual recession of said river westward the quantity of land in said tract has been materially increased by accretion. Jo. C. Marley, however, by this

contract only binds himself for the land including in the original boundaries, that is to say, on the western boundary by the line where the river originally called for; as to the land between that point and where the river now actually is this contract is intended and understood to be only a quit claim. As to tracts No. 2 and No. 3 and as to tract No. 1 to give Thomas H. Hobbs whatever right Jo. C. Marley may have at the same time not binding himself to protect Thomas H. Hobbs west of the original western boundary. It is further agreed and understood that the said notes of Thomas H. Hobbs shall be promptly paid at maturity; if he makes any failure in this respect all his right as to Tract No. 1 hereinbefore agreed to shall immediately cease, it being the intention of the parties by this clause to secure a prompt payment of said notes and only failure to stop Thomas H. Hobbs immediately from cutting or removing any timber from said Tract No. 1. Jo. C. Marley on his part further agrees that whenever Thomas H. Hobbs fully complies with the terms of this contract to convey by deed with usual covenants to Thomas H. Hobbs said Tract No. 2 and his undivided one-half interest in said Tract No. 3. It may be that Jo. C. Marley's agent, Thomas Price, has rented some portion of said Tract No. 2 for the present year; if this be a fact Thomas H. Hobbs accepts this contract subservient to said lease or leasage. The above mentioned notes executed by Thomas H. Hobbs to Jo. C. Marley for said land and timber have been signed by J. T. Williams as security to same. Witness our hands this 7th day of November, 1887.

Jo. C. Marley.
T. H. Hobbs.

State of Tennessee, Lauderdale County:

Personally appeared before me, clerk of the county court of said county, Jo. C. Marley and T. H. Hobbs, the within named bargainors, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained. Witness my hand at office this 7th day of November, 1887.

W. H. Jackson, Clerk.

Presented for registration on the 7th day of November, 1887, at 5 o'clock p. m.

John D. Baxter, Register.
By W. M. Mays, D. R.

State of Tennessee, Lauderdale County:

I, J. Monroe Garrett, Register of said county and state, do certify that the above and foregoing is a true and correct copy of an agreement between Jo. C. Marley of the first part, and Thomas H. Hobbs of the second part, as the same appears and remains of record in my office in Book X, page 61, et seq. Witness my hand at office this 29th day of May, 1899. (10c. Rev. Stamp.)

J. Monroe Garrett, Register.

5. A deed in trust from Thomas H. Hobbs to E. L. McGowan, trustee, of date December 12, 1890, as follows:

Trust Deed: T. H. Hobbs to E. L. McGowan. State of Tennessee, Lauderdale County: Know all men by these presents that I, Thomas H. Hobbs for the consideration of five dollars and the other considerations herein below named have bargained and sold and do hereby bargain, sell, transfer and convey unto E. L. McGowan, of Memphis, Tenn., of the firm of Toof, McGowan & Co., trustee the following parties and items of my property situated in Lauderdale county, Tennessee, namely, my timber contracts with Jo. C. Marley made about three years ago and which is signed by said Marley and myself and which is registered in the register's office at Ripley in said county, and by said contents I purchase from said Marley all the timber of every kind on his lands near the mouth of Coal Creek, and lying almost altogether on the north side of said creek, said land on which said timber stands is known as the Woodfolk entry and containing originally five thousand acres, together with considerable accretions on its Mississippi river front, about six hundred acres of it lies south of Coal Creek; said lands are bounded on the north by the Howard place, owned by Glass and Butler and J. W. Jarrett, and by the Embrey place, owned by W. E. Lambreth, and partly by James Johnson and others, on the south by James Walker's lands, W. S. Wright's and the Barbee and Lakey lands; on the east by the Kellar lands and Webb's lands and others; on the west by the Mississippi river—said Howard tract and the Fort Pillow tract conveyed to me by Jo. C. Marley and Thomas Price, Marley having conveyed to me his half interest in said Fort Pillow tract by the same instrument that embodies said timber contract. I convey all said timber on said lands of Jo. C. Marley that he has sold me with the right to remove the same in six years from the time it was made which would be about the latter part of the year 1894, but subject to what I yet owe Jo. C. Marley on same, being about $3000.00, represented by three notes for $1000.00

each. I also convey to said E. L. McGowan as such trustee, the said Fort Pillow tract of land so purchased by me from said Marley and described in said deed and contract. It is bounded on the west by the Mississippi river on the north and east by the said Woodfolk lands, owned by Jo. C. Marley, on the south by Coal Creek, containing originally about 500 acres, but by accretion on the Mississippi river much more than that. I also convey to said McGowan, as trustee, the tract of about 40 acres which was also conveyed to me by said Marley in the same instrument which contains said timber contract lying in the 4th Civil District of said county, south of Coal Creek, which I bought for and used for a while as a mill site, but now use it as a lumber yard; said tract is bounded on the north by Coal Creek, east by the Hotchkiss place, on the south by Jo. and Tom Price, and on the west by the Mississippi river; reference is made to said registered contract between Jo. C. Marley and myself for further description of the lands on which the said timber stands and of the other above mentioned tracts of land. I also convey to said McGowan, trustee, my entire stock of merchandise in my store house at Fort Pillow, in the 4th District of said county, consisting of groceries, drygoods, notions, drugs, etc., also the show cases, scales and iron safe, and the store house furniture of my said store; also my books of accounts, consisting of two ledgers, cashbook, shipping book and day book, used and kept by me at my said store, and I assign to him all the accounts and claims I have upon said books against numerous persons with whom I had dealings. I estimate said stock of merchandse to be worth about $900.00 and the accounts are nominally about $3000.00, although not worth probably now more than two-thirds of that amount. To secure some of said claims, being for supplies, I have liens on certain cotton and corn raised by Jno. Young, Bill Suggs, West Fortner and Peter McFadden, raised in said county. I also assign my lien in these cases to said trustee. The crops of cotton raised by West Fortner and myself in 4th District of said county this year is one-half of it mine; that interest I also convey to said trustee. I sold said West Fortner a roan mare for $135.00 on a credit till this fall, title reserved in myself till paid for, and I also sold John Young a mare mule, plow and harness for $140.00 on a credit title reserved in myself till paid for and I sold said Young a wagon for 100 bushels of corn, title to remain in myself until paid for I also sold to Bill Suggs a horse mule for $75.00 and a cow and calf for $25.00, title of all of which was to remain in me till paid for. None

of said property so sold by me has been paid for and I transfer the claims against all said parties to said trustee and transfer the title of said property to him with right to collect the payment for same or if he can not collect to take the property and dispose of it under this trust. I also convey to said trustee my two log wagons and my six yoke of oxen and chains and swamp hooks thereto belonging also my buggy and rockaway; to have and to hold all said property to said E. L. McGowan, trustee, in fee simple. I covenant that I am well seized of all said property and have good right to convey it and that I will forever warrant and defend the title thereof to said trustee his heirs and assigns against the lawful claims of all persons whomsoever.

But the conveyance is made to secure the following debts which I owe, namely:

An account to Baxter & Co., Memphis, $43.00.
An account to Woods & Woods, Memphis, $28.33.
An account to J. A. Samuels, Memphis, $93.03.
An account to R. G. Craig & Co., Memphis, $3.95.
An account to Vaccaro & Co., Memphis, $122.25.
An account to Mansfield Drug Co., Memphis, $23.69.
An account to J. E. Randle, Memphis, $53.50.
An account to John A. Denie, Memphis, $4.50.
An account to Collins Bros., St. Louis, $22.47.
An account to R. M. Hughes & Co., Louisville, $20.75.
An account to Goodbor & Co., Memphis, $292.80.
An account to Orgill Bros., Memphis, $10.40.
An account to Lemon & Gale, Memphis, $319.64.
An account to Malone, Chopman & Co., Memphis, $109.23.
An account to F. O. Zainne & Co., Memphis, $35.52.
An account to Robinson Black Co., Memphis, $231.46.
An account to Towner & Co., Memphis, $66.54.
An account to J. A. Austin & Co., Memphis, $4.13.
An account to Toof McGowan & Co., Memphis, $3005.40.
An account to E. C. Atkins & Co., Memphis, $109.71.
An account to Slattey & Glaise, Fulton, $44.40.
An account to Scarff Bernheimer & Co., St. Louis, $220.75.
An account to Jake Brown, Ft. Pillow, $52.21.
An account to Bill Hobbs, Ft. Pillow, $14.59.

On a settlement with the Southern Transportation & Lumber Co., of St. Louis, Mo., they will be considerably indebted to me; I also assign that claim to said trustee McGowan along with other claims above mentioned. I also owe Mrs. Kate Grims, of Ripley, Tenn., a note of

$500.00 and Miss Ellen Mosely a note for $500.00 and a note to Mrs. Blossie Scott or to J. E. Palmer for her use in about the sum of six hundred dollars and a note to Jno. Y. Barbee for about $400.00 and a note to M. D. Webb for $1,000.00 and a note to James Walker for about $1,000.00 and a note to Mrs. Annie Slattery for about $1,500.00. This conveyance is made to secure all my before mentioned debts which I believe to be a correct list though the amounts may vary somewhat from these I have stated. Now if I have omitted to name any creditor it has been unintentional and any such that may have been omitted I desire to participate equally with those who are named in the benefit of this trust. The said trustee E. L. McGowan is authorized and empowered to sell out at retail the said stock of merchandise herein conveyed to him until February 1, 1891 for cash at which time after advertising the same properly he will sell for cash what of said stock of merchandise, safe, show cases and furniture either publicly or privately as shall be for the best interest of said creditors for cash. He will as speedily as possible collect all said debts I have so assigned to him. The other personal property herein mentioned said trustee will take immediate possession also and sell with as little delay as possible all of the same either publicly or privately as may be most advantageous. The cotton he will sell for cash. The other of said articles of personalty he will sell either for cash or on a credit no longer than six months as he may deem best taking note with good security from the purchaser. As the said timber contract with Jo. C. Marley is more valuable now than it will be after any considerable delay the said trustee, E. L. McGowan is authorized and directed to make sale of my rights under said timber contract as soon as he can do so consistently with the interest of the fund after properly advertising the same and he is authorized to sell the same as a whole or by partitioning the same as may appear best either at a private or public sale and for cash or on credit or for part cash and for part on a credit and in case of a credit sale he will take notes with good security for the purchase price the credit not to be for a longer time than one year. I am sensible that a piece of property like this requires to be judicially handled to make the most of it and that the trustee is necessarily given the discretion allowed him in order to prevent a sacrifice. The proceeds of all the foregoing property choses in action, etc. I desire and direct the trustee to apply first to pay the expense of this trust, and secure to pro rata all my foregoing debts and

others I may owe but mention of which has been omitted. If all my said debts are not fully paid by January 1, 1892, then said E. L. McGowan as such trustee is authorized and empowered to sell at public auction at the court house door at Ripley in said county for cash the hereinbefore described two tracts of land lying in said county, viz., the 40 acre tract purchased by me from Jo. C. Marley and Thomas Price containing originally 500 acres, by now by reasons of accretions much more than that, he will advertise the time, place and terms of such sale for at least 30 days at the court house in Ripley, Tennessee, and five other public places in said county and allow if he thinks best in Ripley and Memphis papers or some of them. Should the said trustee however, before said January 1, 1892, be able to make sale of either or both of said tracts of land for cash at an advantageous price then in such case he is authorized to sell either or both of said tracts at private sale for cash and in case of sale under this trust deed of said land I hereby waive and relinquish all right to redeem or repurchase the same and direct the trustee to sell and convey accordingly the proceeds of said two tracts of land the said trustee will apply to pay first expenses of this trust and second to pay all my said debts. This December 12, 1890.

T. H. Hobbs.

State of Tennessee, Lauderdale County.

Personally appeared before me clerk of the county court of said county, T. H. Hobbs the within named bargainor with whom I am personally acquainted and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand at office this 13th day of December, 1892.

H. W. Wardlow, Clerk.

Presented for registration on the 13th day of December, 1890, at 8:28 o'clock a. m.

Jno. E. Walker.

This is the same as the other except that is signed also by his wife this December 12, 1890.

T. H. Hobbs.
L. E. Hobbs.

State of Tennessee, Lauderdale County.

Personally appeared before me clerk of the county court of said county, T. H. Hobbs, the within bargainor

with whom I am personally acquainted and who acknowledges that he executed the within instrument for the purpose therein contained.

Witness my hand at office this 13th day of December, 1890.

John W. Wardlow, Clerk.

I, L. E. Hobbs wife of T. H. Hobbs join in this conveyance for the purpose and do hereby waive all right to homestead, dower or exemption in said above described lands, this December 12, 1890.

L. E. Hobbs.

State of Tennessee, Lauderdale County.

Personally appeared before me clerk of the county court of said county, L. E. Hobbs, bargainor to the foregoing and hereto attached deed of trust with whom I am personally acquainted and who acknowledged that she executed the same for the purposes therein contained. And L. E. Hobbs wife of the said T. H. Hobbs, having appeared before me privately and apart from her husband the said L. E. Hobbs acknowledged the execution of said instrument to have been done by her freely, voluntarily, and understandingly without compulsion or constraint by her husband and for the purpose therein expressed.

Witness Jo. H. Wardlow, clerk of county court of said county of Lauderdale, Tennessee, at office in Ripley this 18th day of December, 1890.

Jo. H. Wardlow, Clerk.

State of Tennessee, Lauderdale County.

I, John E. Walker, Register of Lauderdale County hereby certify that the foregoing trust deed with clerk's certificate endorsed thereon was presented for registration on the 13th day of December, 1890, at 8:23 o'clock a. m., and is so noted in my office in note book 4, page 138, and the same is duly registered in book A A, page 112.

Witness my hand at office in Ripley this 13th day of December, 1890.

John E. Walker, Register.

Presented for reregistration on the 18th day of December, 1890, at 4:38 o'clock p. m.

Jno. E. Walker, Register.

6. A deed from E. L. McGowan, trustee, to J. T. Williams of date October 16, 1891, as follows:

Deed: E. L. McGowan to J. T. Williams.

This instrument made and entered into on this 16th day of October, 1891, by and between E. L. McGowan, trustee of Thomas H. Hobbs, of the city of Memphis, Shelby County, Tennessee, of the first part and J. T. Williams, of Lauderdale County, Tenn., of the second part witnesseth that whereas heretofore, to wit, on the 12th day of December, 1890, one Thomas Hobbs did make, execute and deliver to the party of the first part a deed of trust upon certain property therein set forth; said deed of trust is registered in the register's office at Ripley, Tennessee, in book A A, pages 112 to 116 and also on pages 138 to 144 and is here referred to if copied in full; and in said deed of trust said Thomas H. Hobbs secures Mrs. Kate Given, $500.00 by note; Blossie Scott, $600.00, M. D. Webb, $1,000.00 by note; James Walker, $1,000.00 by note and Annie Slattery $1,500.00 by note, and the said J. T. Williams party of the second part is the security of said Hobbs on all said notes; and whereas said Thomas H. Hobbs owes Jo. C. Marley, of Ripley, Tennessee, about $4,000.00 balance of the purchase money on said land referred to in said deed of trust and his timber contract with said Jo. C. Marley on the 5000 acre tract of land referred to in said deed of trust; and said J. T. Williams is also security to said Jo. C. Marley for said Thomas H. Hobbs on said $4000, is also a lien on said land and said timber contract. And whereas said J. T. Williams party of the second part has agreed with E. L. McGowan, trustee of said Thomas H. Hobbs party of the first part that if said timber contract said Thomas H. Hobbs had with said Jo. C. Marley is conveyed to him and also the land referred to in said trust deed that he will not claim any pro rata under the said trust deed out of the other property therein conveyed for the debts he is security for, for said Thomas H. Hobbs and the said party of the first part has accepted said proposition. Now therefore in consideration of the premises and the authority and power vested in me by said trust deed and it being for the interest of all parties concerned and in consideration of said Williams paying the debts he is security for, for said Thomas H. Hobbs as above set forth and not to claim any pro rata for said debts out of the other property conveyed to me by said trust deed, I have this day bargained, sold, transferred and conveyed to the said J. T. Williams said timber contract said Thomas H. Hobbs had with Jo. C. Marley referred to in said trust deed and also of record in said register's office at Ripley, Tennessee and

is here referred to and also said tracts of land referred to in said deed of trust and also described in said timber contract of said Thomas H. Hobbs and said Jo. C. Marley.

To have and to hold said property to said J. T. Williams, his heirs and assigns forever, this day and year above written.

E. L. McGowan, Trustee for,
T. H. Hobbs.
J. T. Williams.

State of Tennessee, Shelby County.

Personally appeared before E. L. McGowan, Jr. a notary public in and for the said state and county at Memphis, duly commissioned and qualified E. L. McGowan and J. T. Williams the within named bargainors and with whom I am personally acquainted and who acknowledged that they executed the within instrument for the consideration and purpose therein contained.

Witness my hand and notarial seal at Memphis, aforesaid this 16th day of October, 1891.

Evander L. McGowan, Jr.,
(L. S.) Notary Public.

Presented for registration on the 19th day of April, 1892, at 9 1-4 o'clock a. m.

John E. Walker, Register.

7. A deed from J. T. Williams to J. H. Polsdorfer, of date July 12, 1892, as follows:

This indenture, made and entered into on this 12th day of July, 1892, by and between J. T. Williams, of the first part, and John H. Polsdorfer, of the second part; witnesseth, that whereas, on the 7th day of November, 1887, Jo. C. Marley and Thomas H. Hobbs entered into a contract in writing, which is duly registered in the register's office in Ripley, Tennessee, in Book X, page 61, et seq., by which said Marley sold and conveyed to said Hobbs all the timber he could cut and remove from the 5000 acre tract of land, described in said contract as tract No. 1, by the 7th day of November, 1893; also sold and conveyed to said Hobbs the fee simple title to the 15 acre tract, described in said contract as tract No. 2, and also sold and conveyed to said Hobbs the fee simple title to an undivided half of the other tract, described in said contract as Tract No 3. And whereas, Thomas Price owned the other undivided half of said tract mentioned in said contract as tract No. 3, and he, on the 28th day of November, 1887, by his deed of said date, his wife join-

ing therein, sold and conveyed his undivided half of said tract to said Hobbs, said deed from said Price and wife is registered in the register's office at Ripley, Tennessee, in Book V, pages 557-8. And whereas, said J. T. Williams, party of the first part, has become the owner of said Hobbs' right to cut the timber off of said 5000 acre tract and the fee simple title to said other two tracts by deed from E. L. McGowan, trustee of said Thomas H. Hobbs, the deed from said Hobbs to said McGowan being registered in the register's office at Ripley, Tennessee, in Book A. A., pages 112, et seq., and page 138, et seq., and the deed from said McGowan to said Williams being registered in the register's office at Ripley, Tennessee, in Book B. B., page, 525. And whereas, said John H. Polsdorfer, party of the second part, has this day purchased from Jo. C. Marley said 5000 acre tract subject to said timber, and has said Marley's deed for the same. And whereas, said J. T. Williams has this day sold to said John H. Polsdorfer his right to cut and remove the timber off of said 5000 acre tract, and also the fee simple title to said two tracts of land and a certain steam saw-mill and fixtures on same at Ft. Pillow, on the Hotchkiss land for the consideration of eight thousand dollars, three thousand dollars of said amount cash in hand paid, and the two notes of said Polsdorfer for ($2500.00 twenty-five hundred dollars each, one due one year after date, and the other due two years after date, both bearing interest from date and made payable to said J. T. Williams, said two tracts of land lying and being in the 4th Civil District of Lauderdale County, Tennessee, and the 15 acre tract is described as follows: Beginning in the west boundary line of the Hotchkiss tract of land at a hornbeam marked M, with white oak and dogwood pointers in the top bank of Cole Creek Bluff; thence north with the Hotchkiss west boundary line to the center of Cole Creek; thence down said creek with its meanders to the main channel of the Mississippi river; thence down the main channel of said river to a willow marked M, on the bank of said river with willow pointers; thence east to an elm marked M, with a locust pointer standing on the brink of the bluff, near the old fort or near the breastworks or lower corner of the old fort; thence in an easterly direction with the brink of the bluff to the beginning; this last line to be run so as not to interfere with the cleared land on the bluff. The other tract is bounded as follows: Beginning at a stake in Cole Creek, where the said crosses the east boundary line of entry No. 7987 in the name of the heirs of Robert Turner, of which this

is a part for 2567 acres; thence north to the northeast corner of same; thence down the Mississippi river to the mouth of Cole Creek; thence up said creek with the center of the channel to the beginning, containing 400 acres, more or less. Now, for the consideration aforesaid, I, J. T. Williams, party of the first part, have this day bargained and sold, and do transfer and convey to said John H. Polsdorfer, party of the second part, the property herein described, to wit, my right to cut timber on said 5000 acre tract, and said two tracts of land, and said steam saw-mill and fixtures; to have and to hold same to said John H. Polsdorfer, his heirs and assigns forever. And I covenant with said John H. Polsdorfer that I will warrant and defend the title to the property herein conveyed against the lawful claims of all persons whatever, except the claim for the unpaid purchase money, and a lien is retained on the property herein conveyed until all the purchase money is paid. Said Williams also conveys any lawful right he has to the accretions or alluvion formed in front of said 400 acre tract to said John H. Polsdorfer.

J. T. Williams.
Martha Williams.

State of Tennessee, Lauderdale County.

I, John E. Walker, register of said county, certify that the foregoing deed, with the clerk's certificate endorsed thereon, was presented for registration on the 13th day of July, 1892, at 11:37 o'clock a. m., and is so noted in my office in Note Book No. 4, page 155, and the same is duly registered in Book C. C., pages 39, 40, 41, 42. Witness my hand at office in Ripley, this 14th day of July, 1892.

John E. Walker, Register.

State of Tennessee, Lauderdale County.

Personally appeared before me, J. H. Wardlow, clerk of the County Court of said county, J. T. Williams and Martha Williams, bargainors to the foregoing and hereto attached deed, with whom I am personally acquainted, and who acknowledged that they executed the same for the purposes therein contained. And Martha Williams, wife of the said J. T. Williams, having appeared before me privately and apart from her husband, the said Martha Williams acknowledged the execution of said instrument to have been done by her freely, voluntarily and understandingly, without compulsion or constraint by her husband, and for the purposes therein expressed.

Witness J. H. Wardlow, clerk of the County Court of Lauderdale County, Tennessee, at office in Ripley, this 13th day of July, 1892.

Jo. H. Wardlow, Clerk.

8. A deed from J. C. Marley to J. H. Polsdorfer, of date July 12, 1892, as follows:

State of Tenn., Lauderdale Co.

This deed witnesseth that I, Jo. C. Marley, of said state and county, for and in the consideration of the sum of five thousand six hundred dollars on the following payments (to wit), eighteen hundred and fifty dollars to me cash in hand paid by J. H. Polsdorfer, of Evansville, State of Indiana, the receipt of which is hereby acknowledged; fifteen hundred dollars due and payable twelve months after this date; fifteen hundred dollars due and payable two years after this date, and the sum of seven hundred and fifty dollars due and payable three years after this date, for which J. H. Polsdorfer has executed to me his three several notes of this date, all of said notes bearing interest from this date until paid at the rate of 6 per cent per annum. And to secure the payment of said notes a lien is hereby retained on the land herein conveyed. I have bargained and sold, and do hereby transfer to the said J. H. Polsdorfer the following described lands (to wit), a certain grant of land made by the State of Tennessee to W. W. Woodfolk on 28th July, 1837, by grant No. 3245, and conveyed by said Woodfolk to me by deed recorded in register's office of said County of Lauderdale, in Book D, pages 137, 138 and 139. And is thus bounded and described in said grant (viz.): Beginning at a hackberry marked W, hackberry and elm pointers in the Mississippi bottom above the mouth of Coal Creek 260 poles north from the northeast corner of Occupant Entry No. 1, in the name of Thomas Peal and Moses Fletcher for 400 acres; thence south to their N. E. corner and with their east boundary line, in all 420 poles to a stake on the bank of the main channel of the Mississippi River; thence down the channel of the river with its meanders, 640 poles to a stake on the main channel 45 poles west of 2560 acres entered in the name of the heirs of Robt. Turner, entry 798; thence east 45 poles to the north E. corner of the same to an elm, ash and hackberry marked XX; thence south with this line 170 poles to a pecan, 2 cottonwood marked XX, I J. Pinson northwest corner of Mill claim for 100 acres, entry No. 11; thence east with his line passing his N. E. corner and running

on the north boundary line of A. A. Kidd occupant entry No. 23, in all 225 poles to his N. E. corner on a cypress, elm, maple and hawthorne pointers; thence south with line 8 poles to a stake and cypress and elm, 2 cypress pointers, Hugh Liepers, N. W. corner of his occupancy entry No. 22 for 162 acres; thence east with his line passing his N. E. corner and running with the north boundary line of John Vasser's occupant entry No. 2, for 200 acres and 75 poles to its northeast corner, and in the west boundary line of the East Tenn. College 640 acres, entry No. 773, on a red oak, poplar and red oak pointers; thence north with said entry passing its N. W. corner and running on the west boundary line of Coleman Hutcherson occupant entry No. 24 for 154 acres to his N. W. corner, in all 133 poles to a stake in "Goose Pond"; thence east with his line 120 poles to a sycamore, red oak and mulberry pointers, it being the southwest corner of Wm. Gray's occupancy entry No. 25 for 200 acres; thence north with his line 155 poles to his N. W. corner in a small pond; thence east 220 poles to his northeast corner on a dogwood and two dogwood pointers in Lee Hutcherson west boundary line of mill entry No. 28 for 100 acres in the name of Hutcherson, in all 180 poles to his corner on a sweetgum; thence east with his line 100 poles to west boundary line of Grant No. 297 for 5000 acres to John Rice; thence north with his line 420 poles to a cottonwood and hackberry marked XX; thence west 670 poles to a stake on the east boundary line of entry No. 1576 for 164 acres made in the name of Scott Gray; thence south with his line 40 poles to his S. E. corner; thence west 190 poles to his S. W. corner; thence north with his line 40 poles to a stake; thence west 550 poles to the beginning, containing 5000 acres. To have and to hold the same with all appurtenances and accretions and hereditaments to the said J. H. Polsdorfer, his heirs and assigns forever, subject to agreement and contract with T. H. Hobbs about cutting and moving timber from said 5000 acres, by contract recorded in the register's office of said County of Lauderdale, in Book X, page 61-2-3-4-5 and 6, reference being had thereto; and this deed is made subject to said Hobb's right to cut timber on said land, and Hobbs, his heirs and assigns, are to have the right to cut and remove the timber from said land as set forth in said contract between him and me. There is included in the above boundaries of said 5000 acres a tract of 500 acres entered in the name of Frederick Hargate, which belongs now to Paul Keller, and said 500 acres is excepted out of this conveyance and is not sold by me. I

covenant to and with the said J. H. Polsdorfer that I am lawfully seized of said grant of land, have good right to convey it and that it is not encumbered except by said Hobb's right to cut timber on said land, and the lien of the notes for the purchase herein retained. And I do warrant said title to as much as 5000 acres to pass to J. H. Polsdorfer. And in case of a survey of said land there should be less than 5000 acres, I am to deduct and enter a credit on said Polsdorfer's notes with the same at the rate of one dollar and twelve cents per acre for what it may fail to have as much as 5000 acres which passes by this deed. Subject to a lien for the purchase money and also subject to Hobb's right to cut timber.

Witness my hand this 12th day of July, 1892.

J. C. Marley.

Recorded 13th of July, 1892, at 11:31 o'clock a. m., and noted in Note Book 4, page 155. Registered in Book C. C., page 36-7-8-9.

9. A contract between J. C. Marley and J. H. Polsdorfer, as to the possession, as follows:

Memorandum 12th July, 1892, between J. H. Polsdorfer and Jo. C. Marley. Jo. C. Marley and H. E. Price and wife, having this day conveyed to said Polsdorfer the Fort Pillow tract of land which is rented out to L. R. Colman for the present year, possession of the same is not to be required by said Polsdorfer until the end of present year, and said Polsdorfer is to have such part of said rent as may be coming to said Marley from said Colman. And whereas a suit is pending in Circuit Court at Osceola, Arkansas, between E. M. Ayers and W. Fortner concerning the possession of certain land this day sold by said Marley to said Polsdorfer, said Marley is to continue to attend to said suit and pay attorney fees for having said suit defended in state court, but said Marley does not warrant the title of said land nor does he incur any liability as to result of said suit. This 12th day of July, 1892. Signed in duplicate.

Jo. C. Marley.
J. H. Polsdorfer.

Witness: J. T. Williams.

10. Agreement between defendant, Price, and J. C. Marley, of date October 20, 1891, as follows:

A copy: Jo. C. Marley has the original. State of Tennessee, Lauderdale County. I, Thomas Price, of Fort Pillow, Lauderdale county, in said state, having this day

tendered an entry to M. W. Gudger, the county surveyor, of said county, for certain tract of land in the 4th Civil District of said county embracing the lands that has formed in front of the 5000 acres granted to W. W. Woodfolk and by him sold to Jo. C. Marley on the Mississippi river above the mouth of Coal Creek, and on which the Wes. Fortner is settled as the tenant of said Marley, and also embracing what may be termed an accretion to part of tract of land granted to Robert Turner's heirs which the said Marley and Price sold to one Thomas H. Hobbs, north of the mouth of Coal Creek, in said county; now, in consideration of said Marley not resisting said entry being made and a grant obtained from the state of Tennessee for said land so entered by the said Price to-day, the said Thomas Price doth agree that he will not interfere or claim any part of said land so entered by him which may be an accretion to the said Woodfolk tract and to the said Turner tract, and in no wise to interfere with the possession of said West Fortner and where he now lives as said Marley's tenant, and if and when said entry so made by said Price is granted. The said Price agrees to convey and quit-claim to said Marley all of said land that is embraced in the Woodfolk survey east of Crutcher's Lake and the accretion thereto, and also quit-claim and convey to the owners of the Hobbs tract so conveyed him by the said Price and Marley to said Hobbs all the just and rightful accretion to the same so as to make good all contracts and conveyances made by said Marley and Price about said part of the Turner survey. Witness my hand the 20th day of October, 1891.

(Signed.) Thomas Price.

Witness: (Signed.) M. W. Gudger.

11. The map furnished the plaintiff, Polsdorfer, by defendant, Marley, when he purchased the property, mentioned in his testimony.

J. C. Marley, a witness for the plaintiff, testified as follows:

Examination by Mr. Randolph:

Q. Mr. Marley, please look at that rough sketch and see if you recognize it as a substantial sketch of the land you sold to Mr. Polsdorfer by the deed in evidence?

A. Yes, sir; that looks like it.

Q. Looks like a rough description of the land?

A. Yes, sir; that is what it looks like.

Q. How long have you known that land?

A. I bought it in '67.

Q. What was its condition then?

A. It was woodland in the Mississippi bottom, subject to over-flow.

Q. Did you take possession or put any tenant on it?

A. No, sir. I sold timber off it occasionally and I cut some timber off it myself and I give some men permission to cut off it.

Q. You gave some men permission to go on this 5000 acres and cut timber?

A. I gave a man by the name of McKay a lease and he went on the land and stayed a little while and he took some men with him.

Q. When was that?

A. I suppose probably fifteen or twenty years ago.

Q. Whom did you next put on the land?

A. I didn't put anybody there that fall to settle on it, except I give permission for them to cut until I sold the right to Mr. Hobbs.

Q. That was in 1887?

A. Yes, sir.

Q. That is the contract here read?

A. Yes, sir.

Q. You gave Mr. Hobbs the right to go on that land by that contract?

A. Yes, sir.

Q. Did he go?

A. Yes, sir.

Q. This man Fortner, who is he?

A. He was a man put in by those parties. Mr. Ayres and some other men went over there and settled and built a cabin and Hobbs complained and had them put off. They had built a cabin and I think they had some agreement and Hobbs let them stay until the end of the year and then they got out and he put Fortner in?

Q. Fortner was put in there by Hobbs?

A. Under Hobbs, yes, sir.

Q. Is this your deposition (hands witness paper)?

A. Yes, sir.

Q. This is the deposition you gave in the chancery court?

A. Yes, sir.

Q. Those proceedings were had before a magistrate?

A. Yes, sir.

Q. And these men who were the defendants in this suit were put off that land?

A. Yes, sir; that was my understanding.

Q. Did you ever talk to Mr. Ayres about the suit?

A. No, I don't think I ever had any conversation with Mr. Ayres about the suit, but he was made a party; but he wasn't summoned. I think you'll find that the writ is against him, but they didn't get service on him. I don't know except then that the men were on the land. Well, I know they claimed to be under Ayres.

Q. They claimed to be under Ayres?

A. Yes, sir.

Q. While they were on the land?

A. Yes, sir.

(Judge Heiskill)

Q. How did you know that?

A. I was over there and I asked them, "What are you doing here," and they said they were working for Hobbs.

Q. Mr. Fortner was there when you made this trade with Polsdorfer?

A. Yes, sir.

Q. How much land did he occupy?

A. Well, a cabin and a little patch there.

Q. He rented all the land there?

A. No, sir.

Q. Just the cabin and a little clearing?

A. I don't know.

(Judge Flippin):

Q. Just a little cabin and a little clearing? And he went in under Mr. Hobbs?

A. Yes, sir.

(Mr. Randolph continues):

Q. You didn't really sell that land to Hobbs but gave him the right to cut timber off it, that is the 5000 acres?

A. No, I didn't sell it to him.

Q. Now, when you sold to Polsdorfer, Fortner was in that little cabin?

A. Well, I don't know.

Q. You don't know?

A. When I sold the land the suit was pending in Arkansas.

Q. Now, what became of that suit, Mr. Marley?

Objected to by Judge Heiskill.

Objection sustained.

Exception by Mr. Randolph.

Q. After you had sold this land to Polsdorfer you turned it over to him?

A. Yes, sir.

Q. He went in possession of it?

Objected to by Judge Heiskill.

Objection sustained.

Q. What did Polsdorfer do after you sold him the land?

A. I sold him the land and he had bought out Mr. Hobbs' right was my understanding, but when he took possession or what sort of possession I don't know.

Q. Have you never been on the land?

A. Yes, sir.

Q. He took possession of the mill below the 5000 acres?

A. It was not on the 5000 acres, but he didn't find anybody in possession of the 5000 acres.

Q. Did you go on the 5000 acres?

A. Yes, I rode over part of it.

Q. This cabin of Fortner's, do you know where that is?

A. Yes, sir.

Q. Just point it out on that map?

A. The cabin of Fortner, I think, is about where the O in the Old River is.

Q. Is it in front of what you call the Woodfolk tract?

A. Yes, sir.

Q. At what point?

(The witness points out on the map the place where he thinks the cabin located.)

A. I think the Fortner house would be about where that O is.

Q. What, out on that accretion?

A. Yes, sir.

Q. That is down on that Woodfolk grant from Old River?

A. Yes, it is a little below that.

Q. Fortner was there when you last saw the cabin?

A. I didn't hear you.

Q. I say, Fortner, Fortner—

A. Yes, sir.

Q. He was there in that cabin when you last saw it?

A. I don't know.

Q. Was it vacant when you last saw it?

A. Yes, sir; it was vacant the last time I saw it.

Q. When was that?

A. Two or three years ago.

Q. Did you make this map or a map like it?

A. No, sir; I never—

Q. Well, did you make one substantially like it?

A. Yes, sir. But I never marked it. So far as an accretion here, I never represented to Polsdorfer that this land was accreted. You see I sold him this 5000 acre tract and whatever was accretion was to go with it.

Q. Your deed shows what you did?

A. Yes, sir.

Q. Well?

A. Polsdorfer sent me a sketch I had drawn, a rough sketch, I had never had the land surveyed. But by my deed and my knowledge of it, I had given Polsdorfer a sketch to show that the river had changed and he returned it to me and said I could return it to him, that there was a man by the name of Price who had made an entry in there and he was fearful he would take off what I considered the accretion to the 5000 acres. I went and saw Price and he agreed that whatever I got on it went to Polsdorfer.

Q. That was the agreement read just now?

A. Yes, sir. I got back from Mr. Polsdorfer the sketch I had given him and when he returned it I couldn't well describe the tracts adjoining and I drew a new map and marked Price's name on it.

Q. You mean you put Price's name between what you considered the land and the accretions?

A. Yes, sir.

Q. On the map like that?

Judge Heiskell objects to the introduction of the map.

Objection overruled.

Q. Does that map correctly indicate the premises here?

A. I can't say that it does. This is a rough sketch of my idea of it. I don't think it does correctly indicate this formation here. This is accreted land further up.

Q. Is it substantially correct of the land you sold to Mr. Polsdorfer?

A. Yes, I think where it strikes the old channel here, I think that is it. Whilst I haven't had it surveyed from calls, etc., I think it is tolerably correct.

Cross-examination by Judge Heiskell:

Q. Is this the 5000 acres?

A. Yes, sir.

Q. Is this the Turner grant?

A. Yes, sir.

Q. This is the Turner grant down below? I think the number of poles the Turner grant calls for is described from Old River. That is correct?

A. I can't say it is correct.

Q. It is as correct as a rough map usually is?

A. It wouldn't be called a correct map where it calls for 45 poles, I make it nearly as long as 165 poles. It was intended as a rough sketch. I haven't had it surveyed.

Q. Is this the only agreement you have with Price with reference to this grant?

A. Yes, sir.

Q. The matter stands between him and you?

A. Of course, then I traded with Polsdorfer and he was to have the accretions and Price stipulated to make a quit-claim.

Q. He stipulated to make a quit-claim and he hasn't done that?

A. It was simply to carry with the 5000 acres, whatever the accretions were, they went to Polsdorfer.

The Court:

Q. This is the agreement? (Reads.)

A. I was fearful when Price got the surveyor and I found out he had been in there surveying that he had included a portion of the land that might be an accretion to the land I sold, and I told him if there was an accretion it went with the deed.

(Judge Heiskell continues):

Q. Don't you remember to have been there when Gudger surveyed this land?

A. No, sir.

Q. Did he ever survey it?

A. Which?

Q. Didn't he survey Price's entry?

A. No, sir.

Q. Weren't you there when it was done?

A. No, sir.

Q. It had been made before you—

A. I understood he was going in there and I told Price "I object to your going in there unless you allow the accretions."

Q. That was the occasion of this agreement?

A. It was my understanding of that agreement.

Q. I believe you said, Mr. Marley, you were not familiar with the condition of the land in 1867 when you bought it?

A. I didn't hear you.

Q. Didn't you say when you first commenced your examination that you were not familiar with the condition of the land in 1867?

A. No, sir. I was not.

Q. You don't live on the river?

A. No, sir.

Q. And don't often see this land?

A. No, sir. I occasionally went down there—once or twice a year.

Re-examination by Mr. Randolph:

Q. Mr. Marley, do you remember whether or not about the time you made the sale to Mr. Polsdorfer, Mr. Williams also made a sale?

A. Yes, sir.

Q. Was it not a fact that Williams joined you and made one sale?

A. No, sir. I think he bought Williams a little before he bought me out; but we both saw him.

Q. Will you please look at this letter and state whether or not it is yours?

A. Yes, sir; that is mine.

Q. You notice Mr. Marley it says this—

Objected to by Judge Heiskell.

Objection sustained.

Q. There had been some trouble about the Hobbs contract going in before you made the sale. Didn't you make some agreement—

A. What's that?

Q. You were sometime negotiating? You and Mr. Williams were acting co-jointly in making the sale, were you not?

Objected to by Judge Heiskell.

Objection overruled.

Q. This trade was made on the 12th of July, 1892?

A. 12th of July, 1892? Yes.

Q. This letter is dated on 17th of October, 1891?

A. Yes, sir.

Q. Wasn't it a matter of negotiation between you and Mr. Williams from this time on?

A. Yes, sir; Mr. Williams was anxious to sell.

Q. Polsdorfer wanted to buy both or none?

A. I don't know, he bought Mr. Williams first, I think.

Q. Do you remember anything about having an agent by the name of Stroud?

A. I remember Stroud.

Q. He was an agent of yours?

A. He wasn't an agent of mine.

Q. Do you remember referring Polsdorfer to Stroud?

A. No, sir.

Q. Telling Polsdorfer would examine the land with him?

A. No, sir. It is probable that Williams was there, and I think Stroud was down where the mill was.

Q. Did you tell Williams to act for you in showing Polsdorfer the land?

A. No, sir, I don't think I did. I might have told him to show him the land.

Q. While you were owning the land did you pay taxes on it?

A. Yes, sir.

Q. Where did you pay them?

A. At Ripley, in Lauderdale County, Tennessee.

Q. On those 5000 acres?

A. Yes, sir, on those 5000 acres.

Q. Did anybody in Arkansas ever call on you for taxes?

A. No, sir, but they asked for the land.

Q. You didn't give it up, did you?

A. No, sir, I tried not.

Re-cross examination by Judge Heiskell:

Q. When you say you paid taxes you mean on the 5000 acres?

A. Yes, sir.

Q. That is all the property you sold to Polsdofer by deed?

A. Yes, sir, I sold the 5000 acres and agreed if there was any accretions they were to belong to him.

Q. I understand that. Your simple statement is, that when you paid taxes you paid it on the 5000 acres?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. You were assessed on it at Ripley, Lauderdale County, Tennessee?

A. Yes, sir.

Q. And that is all you did pay on?

A. Yes, sir.

Q. So far as this question is concerned, the 5000 acres is all you paid on?

Cross-examination by Judge Flippin:

Q. You said whatever the accretions were—you didn't know that these were the accretions?

A. No, sir, I didn't know what they were.

Q. Did you get a quit-claim for the land or a deed out and out?

A. No, sir, I got a claim for the 5000 acres.

Plaintiffs offers transcript of Forcible Entry and Detainer before a justice of the peace of Lauderdale County, Tennessee.

Objections of the defendants renewed.

Objection overruled because relevant to plaintiff's claim of title by adverse possession.

The Court:

Q. Who were the parties in that case?

A. Thos. H. Hobbs, plaintiff; E. Ayres, Riley Kellam, William Anderson, James Anderson, William Rowland, L. E. Mills, Mrs. Abbie Anderson, J. T. Evans, Abner Anderson and J. H. Pate.

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12. By agreement and permission of the court J. H. Weatherford, a witness for E. M. Ayers, was introduced and testified as follows:

Examination by Judge Heiskell:

Q. What is your business?

A. Surveyor and draftsman.

Q. Surveyor and draftsman? Well, examine that paper and state if you made that plat and those calculations, and if so, from what did you make it?

A. I made them from a copy of a deed of J. C. Marley's to Mr. Polsdofer.

Q. State whether or not that looks like that deed?

A. It seems to be the description from which I made it. It is endorsed on the back as I put it here in drawing.

Q. Now, Mr. Weatherford, how many acres did you calculate?

A. There is one indefinite line on this tract, it is a line on the river. I give 640 poles in length without the exact termination being given, and that leaves some doubt as to the exact line, but as shown here I make it 5730 acres. It might be 50 from that?

Q. You mean take 50 from that?

A. Take or add. It simply says 640 poles long and does not give the exact direction of it and it might make a difference of 50 acres one way or the other.

Q. How many acres did you calculate?

A. 5730 acres.

Q. Did you put down your calculations then?

A. Yes, it is marked on the map.

Q. Marked on the map?

A. Yes, sir.

Cross-examination by Mr. Randolph:

Q. What did you measure there in that map?

A. Well, I made it from my notes.

Q. From calls on the land?

A. No.
Q. Have you ever been on the land?
A. No, sir.
Q. You know nothing of the accretions?
A. No, sir.
Q. You haven't measured the accretions?
A. No, sir.
Q. Just measured the calls of this deed?

13. Plaintiff then offered a certified copy of the record of a case tried before a magistrate at Ripley, Lauderdale County, Tennessee, which was an action of unlawful detainer brought by Thomas H. Hobbs against certain tenants of E. M. Ayres, who were on the land in controversy, which is as follows:

T. H. Hobbs

vs.

Wm. Roland et al.

Before Blair Pierson, Jr., Lauderdale Co., Tenn.

Summons.

State of Tennessee, Lauderdale County.

To the Sheriff or any Constable of said County:

Whereas, complaint is made to me by Thos. H. Hobbs of a certain forcible and unlawful entry and detainer made by E. Ayres, Riley Kellamn, Wm. Anderson, Jim Anderson, Wm. Rowland, L. E. Mills, Mrs. Abbie Anderson, T. J. Evans, Abner Anderson and J. H. Pate, into and of the following described tracts of land situated in said county and state; the first tract containing 5000 acres more or less and being the same land that was granted to Wm. W. Woodfolk by the State of Tennessee, by Grant No. 3245, and bounded as follows: Beginning at a hackberry marked W, hackberry and elm pointers in the Mississippi bottom above the mouth of Cane Creek 260 poles north from the northeast corner of Occupant Entry No. 2 in the name of Thomas Peal and Moses Fletcher for 400 acres; thence south to their northeast corner and with their east boundary line, in all 420 poles to a stake on the bank of the main channel of the Mississippi River; thence down the river with its meanders 640 poles to a stake on the bank of the main channel 45 poles west of the northeast corner of a 2560 acre entry

No. 798, made in the name of the heirs of Robert Turner; thence east 45 poles to the northeast corner of the same to an elm, ash and hackberry marked W; thence south with their line 170 poles to a pecan and two cottonwoods marked W, J. J. Pierson's northwest corner of a mill claim for 100 acres, Entry No. 11; thence east with his line passing his northeast corner and running on the north boundary line of A. W. Kidd's Occupant Entry No. 23, in all 225 poles to his northeast corner on a cypress, elm, maple and hawthorn pointers; thence south with his line 8 poles to a stake and cypress and two cypress and an elm pointers, Hugh Leapers' northwest corner of his occupant entry No. 22 for 162 acres; thence east with his line passing his northeast corner and running with the north boundary line of John Easer Occupant Entry No. 21 for 200 acres 275 poles to its northwest corner, and in the west boundary line of the east Tennessee College 640 acres, Occupant Entry No. 773, on a red-oak, poplar and red-oak poplars; thence north with said entry passing its northwest corner and running on the west boundary line of Coleman Hutcherson's Occupant Entry No. 24 for 154 acres to his northwest corner, in all 133 poles to a stake in Goose Pond; thence east with his line 120 poles to a sycamore, red-oak and mulberry pointers, it being the southwest corner of William Gray's Occupant Entry No. 25 for 200 acres; thence north with his line 155 poles to his northwest corner in a small pond; thence east 220 poles to his northeast corner on a dogwood and two dogwood pointers in Lee Hutcherson's west boundary line of his Mill Entry No. 27 for 100 acres; thence north with his line passing his northwest corner and running on the west boundary line of a Mill Entry No. 28 for 100 acres in the name of Hutcherson, in all 180 poles to his corner on a sweet-gum; thence east with his line 100 poles to the west boundary line of Grant No. 297 for 500 acres to John Rice; thence north with his line 420 poles to a cottonwood and hackberry marked W; thence west 670 poles to a stake on the east boundary line of Entry No. 1576 for 164 acres, made in the name of Scott Crag; thence south with his line 40 poles to his S. E. corner; thence west 190 poles to his S. W. corner; thence north with his line 40 poles to a stake; thence west 550 poles to the beginning; including and excluding Entry No. 1568 for 500 acres, made in the name of Frederick Harget. The second tract lying in said county and state adjoining the above 5000 acre tract and described as follows: Beginning at a stake in Coal Creek, where said creek crosses the east boundary line of Entry No. 798, in the name of the heirs

of Robert Turner, of which this is a part for 2560 acres; thence north to the northeast corner of said entry; thence west to the northwest corner of the same; thence down the Mississippi River to the mouth of Coal Creek; thence up said creek with the center of the channel to the beginning, it being that part of the Robert Turner heirs' entry which lies north of Coal Creek; which said two tracts of land the said Thomas H. Hobbs alleges he is entitled to the possession of, and the said E. Ayres, Riley Kellamn, Jim Anderson, Wm. Anderson, Wm. Rowland, L. E. Mills, Mrs. Abbie Anderson, T. J Evans, Abner Anderson and J. H. Pate unlawfully detain the same from him. You are therefore hereby commanded to summon E. Ayres, Riley Kellamn, Jim. Anderson, Wm. Anderson, Wm. Rowland, L. E. Mills, Mrs. Abbie Anderson, T. J. Evans, Abner Anderson and J. H. Pate to appear before me or some other justice of the peace for Lauderdale County, Tennessee, to answer the above complaint.

Witness my hand this 21st day of December, 1889.

Blair Pierson, J. P. for said County.

Endorsements: T. H. Hobbs vs. Ayres, Riley, Kellaum, Anderson. Writ and bond. Issued December 21, 1889. Blair Pierson, J. P.

State of Tennessee, Lauderdale County.

H. E. Price is my special deputy to execute this warrant, and is so hereby appointed Decr. 21, 1889.

W. R. Miller, Sheriff.

Officer's Return on Warrant.

Executed by summoning William Rowland, L. E. Mills, Mrs. Abbie Anderson, T. J. Evans, Abner Anderson, and J. H. Pate to appear before Blair Pierson, J. P., at his Ripley, Tenn., on the 31st December, 1889, at 12 o'clock m. This 23d December, 1889.

H. E. Price, S. D. S.

E. Ayres, Riley Kellaum, Wm. Anderson and Jim Anderson not found, this 30th day of Decr., 1889.

H. E. Price, S. D. S.

Bond.

State of Tennessee, Lauderdale County.

We, Thos. H. Hobbs and Jo. C. Marley, acknowledge ourselves indebted to E. Ayres, Riley Kellaum, Wm. Anderson and others in the sum of one hundred and fifty dol-

lars, to be paid on the condition that the said Thos H. Hobbs and Jo. C. Marley shall pay all costs and damages which shall accrue to the above named obligees for the wrongful prosecution of a suit of forcible entry and detainer which the said Thos. H. Hobbs is about to commence against them before a justice of the peace for said county.

Given under our hands this 21st day of December, 1889.

Thos. H. Hobbs,
By Jo. C. Marley, Atty.
Jo. C. Marley.

Approved: Blair Pierson, J. P.

Judgment.

T. H. Hobbs

vs.

Wm. Rowland, L. E. Mills, T. J. Evans, Abner Anderson, Mrs. Abbie Anderson and J. H. Pate.

Judgment for the plaintiff vs. defendants that he be restored to the possession of the lands mentioned in the writ and against the defendants for costs of suit and a writ of possession may issue to restore said land to his possession, this December 31, 1889.

Blair Pierson, J. P.

Writ of Possession.

State of Tennessee, Lauderdale County.

To the Sheriff or any Constable of said County—Greeting:

Whereas, at a trial of forcible entry and detainer had in said county on the 31st day of December, 1889, before me, a justice of the peace of said county, judgment was given that T. H. Hobbs recover from Wm. Rowland, L. E. Mills, T. J. Evans, Abner Anderson, Mrs. Abbie Anderson and J. H. Pate possession of two certain tracts of land described as follows, situated in Lauderdale County,

Tennessee: The first tract containing 5000 acres more or less and being the same tract that was granted to Wm. W. Woodfolk by the State of Tennessee by Grant No. 3245 and bounded as follows: Beginning at a hackberry marked W, hackberry and elm pointers in the Mississippi River bottom above the mouth of Cole Creek 260 poles north from the northeast corner of Occupant Entry No. 2, in the name of Thomas Peal and Moses Fletcher, for 400 acres; thence south to their northeast corner and with their east boundary line in all 420 poles to a stake on the bank of the main channel of the Mississippi River; thence down the river with its meanders 640 poles to a stake on the bank of the main channel 45 poles west of the northeast corner of a 2560 acre entry No. 798, made in the name of the heirs of Robert Turner; thence east 45 poles to the northeast corner of the same to an elm, ash and hackberry marked W; thence south with their line 170 poles to a pecan and two cotton-woods marked W, J. J. Pearson's northwest corner of a mill claim for 100 acres Entry No. 11; thence east with his line passing his northeast corner and running on the north boundary line of A. A. Kidd, Occupant Entry No. 23, in all 225 poles to his northeast corner on a cypress, elm, maple and hornbeam pointers; thence south with his line 8 poles to a stake and cypress, two cypress and an elm pointer, Hugh Leaper's northwest corner of his Occupant Entry No. 22 for 162 acres; thence east with his line passing his northeast corner and running with the north boundary line of John Carson Occupant Entry No. 21 for 200 acres 275 poles to its northeast corner and in the west boundary line of the East Tennessee College 640 acre Entry No. 773 on a red oak, poplar and red oak pointers; thence north with said entry passing its northwest corner and running on the west boundary line of Coleman Hutcherson's Occupant Entry No. 24 for 154 acres to his northwest corner, in all 133 poles to a stake in Goose Pond; thence east with his line 120 poles to a sycamore, red oak and mulberry pointers, it being the southwest corner of Wm. Gray's Occupant Entry No. 25 for 200 acres; thence north with his line 155 poles to his northwest corner in a small pond; thence east 220 poles to his northeast corner on a dog-wood and two dog-wood pointers in Lee Hutcherson's west boundary line of his mill entry No. 27 for 100 acres; thence north with his line passing his northwest corner and running on the west boundary line of a mill entry No. 28 for 100 acres, in the name of Hutcherson, in all 180 poles to a corner on a sweet gum; thence east with his line 100 poles to the west boundary line of Grant No. 297

for 5000 acres to John Rice; thence north with his line 420 poles to a cottonwood and hackberry marked W; thence W. 670 poles to a stake on the east boundary line of entry No. 1576 for 164 acres, made in the name of Scott Crag; thence south with his line to his southeast corner; thence west 190 poles to his southwest corner; thence north with his line 40 poles to a stake; thence west 550 poles to the beginning, including and excluding entry No. 1568 for 500 acres, made in the name of Frank Harget. The second tract adjoins the 5000 acre tract and is bounded as follows: Beginning at a stake in Cole Creek, where said creek crosses the east boundary of entry No. 798, in the name of the heirs of Robert Turner, of which this is a part, for 2560 acres; thence north to the northeast corner of said entry; thence west to the northwest corner of same; thence down the Mississippi River to the mouth of Coal Creek; thence up said creek with the center of the channel to the beginning, it being that part of the Robert Turner heirs' entry which lies north of Coal Creek. We thereupon command you that you take with you the force of the county if necessary and cause the Thomas H. Hobbs, plaintiff in said judgment, to have and be returned to the possession of said two tracts of land, and that you remove the said Wm. Rowland, L. E. Mills, T. J. Evans, Mrs. Abbie Anderson, Abner Anderson and J. H. Pate, the defendants in said judgment, therefrom, and give the said plaintiff peaceable possession of said premises and make return to me in twenty days how you have executed this writ, this 8th of January, 1890.

Blair Pierson, J. P.

Said writ is endorsed: Thos. M. Hobbs vs. Wm. Rowland. Writ of possession. Issued Jany. 8, 1890. Blair Pierson, J. P. Officer's return. Executed this writ by putting T. H. Hobbs in peaceable possession of the within described land this January 12, 1890. W. R. Miller, Sheriff.

State of Tennessee, Lauderdale County:

I, Blair Pierson, justice of the peace of said county, do hereby certify that the above and foregoing is a full, true and perfect transcript of the summons, bond, officer's return thereon, judgment, writ of possession and officer's return thereon in the case of Thos. H. Hobbs vs. Wm. Rowland, et al., as appears from the original papers in

said case on file in my office. Witness my hand this April 22d, 1891.

Blair Pierson, J. P.

To the introduction of this record the defendant, E. M. Ayres objected; (a)for the reason that the record showed that it was brought against them alleging that they were unlawfully withholding the possession of 5000 acres of land and that the writ of possession was issued to put them out of possession of this same 5000 acres of land the boundaries of which land did not include the land here in controversy unless the land here in controversy was accretion to said grant; and if it was accretion to the grant it would belong to the plaintiff without any aid from such record; (b) and for the further reason that the land here in controversy was accretion to Flour Island which belonged to the state of Arkansas, being a part of Mississippi county, Arkansas, and that the lands here in controversy were accretions to that island and not to the plaintiff's land and the Tennessee court had no jurisdiction to try the cause, and the whole proceeding was coram non judice. But the court ruled that the record might be read as showing the beginning of the plaintiff's possession of the land in controversy and for that purpose alone it was introduced, to which ruling of the court the defendant, E. M. Ayres, then and there excepted.

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14. J. T. Williams, a witness for the plaintiff, testified as follows:

Examination by Mr. Randolph:

Q. Is your name J. T. Williams?
A. Yes, sir.
Q. You live in Lauderdale county, Tennessee?
A. Yes, sir.
Q. Do you know Polsdorfer?
A. Yes, sir.
Q. Do you know Price?
A. Yes, sir.
Q. Do you remember making a deed to Polsdorfer in 1893 for some land at Ft. Pillow?
A. Yes, sir.
Q. Is that the deed (hands witness paper)?
A. Yes, sir.
Q. Who did you get the land from?
A. I got the land, my recollection is, from T. H. Hobbs.

Q. Under a deed made by Hobbs to McGowan as trustee to you, didn't you?

A. Yes, sir.

Q. Who were you acting in conjunction with in making that sale?

A. Well, Capt. Marley and I were interested in that sale.

Q. What did you have for sale?

A. 400 acres of land in one tract that I got from Mr. McGowan ,and 30 acres, said to be more or less, in a tract, and a mill site and also 70 acres of the land that I sold to Polsdorfer for a mill.

Q. Where was the mill?

A. On Coal Creek about a quarter or a half mile above where the mouth is now.

Q. North of Coal Creek?

A. No, sir.

Q. Which tract was it on?

A. The 30 acre tract.

Q. Had you anything to do with the timber on the 5000 acre tract?

A. Yes, sir; I did after a while. Hobbs had a lease for five or six years, he had bought the timber from Marley and had five or six years to get the timber off. I was considerably involved for Hobbs in the business, I endorsed for him, and he had to give up everything. He made a failure and in doing that I had to assume his debt with Marley. I sold the timber which I had from the timber contract, also, on the 5000 acres to Polsdorfer.

Q. This contract between Marley and Hobbs was in writing?

A. Yes, sir.

Q. You understood it to be in writing?

A. Yes, sir.

Q. In negotiating with Polsdorfer did you show him the premises or did Marley show him the premises?

A. I showed him the premises of what I claimed as mine and the 400 acres and mill site.

Q. Did you say anything about the accretions to the 400 acres?

A. My understanding of the title was that all the accretions went with the land.

Q. Did you show him that land out there as being a part of what you were selling?

A. I showed him the land.

Q. That was out to the river, wasn't it?

A. Yes, sir.

Q. Did you know anything about Stroud?

A. Yes, sir; I knew Stroud.

Q. What was he doing?

A. He was Hobbs' timber man that attended to the timber out in the bottom on that 5000 acres.

Q. Mr. Stroud was assisting you and Hobbs in making the sale?

A. Well, Hobbs was working for me. At the time I sold Polsdorfer I employed him. When I had to take things in hand I employed him as he knew the land. I employed him to look after my business, and he showed Polsdorfer the land, I think.

Q. You think he showed Polsdorfer the land?

A. As well as my recollection is now.

Q. Do you know the place on this disputed ground where a cabin was situated and occupied by Fortner?

A. Yes, sir.

Q. Who was in that cabin when you made your purchase?

A. To the best of my recollection I think Mr. Fortner was there.

Q. Fortner was there?

A. Fortner was on it when I taken charge of the place.

Q. How long did he remain there after that?

A. I think sometime the next spring or summer he moved down to the mill.

Q. He moved down to your mill?

A. Yes, sir; I employed him to take charge of some timber.

Q. Did anybody go into the cabin after that?

A. I don't remember.

Q. Was there any land cleared around that cabin?

A. A little.

Q. Was that cultivated?

A. There were five or six acres in cultivation.

Q. How long had it been cultivated?

A. About three or four years.

Q. When you made the sale to Polsdorfer what did you do with the land?

A. What did I do with the land?

Q. Did you give him possession right away?

A. Yes, sir.

Q. He has been on the land ever since then?

A. I don't know but very little about it since then.

Q. Do you know anything about some men who were on a portion of this land before you got the title from McGowan and Hobbs?

A. Well, my understanding was they were there while I didn't see them I heard they were there.

Q. Did you see anybody on the land?

A. I didn't, sir.

Q. Do you go there?

A. Not until after my possession.

Q. When you took possession?

A. He moved off and I moved down to the mill.

Q. Did you ever know any people by the name of Anderson or Pate?

A. I don't know them.

Q. You didn't know Pate?

A. There was nobody on the land but Fortner.

Q. When you made the sale?

A. That is my recollection.

Q. Do you recollect where Old River is on this land?

A. Yes, sir; I know where they say it is.

Q. How far is it from Old River to the margin of the present river?

A. About three quarters of a mile.

Q. How far above Coal Creek?

A. Above Coal Creek it is much further a couple or three miles.

Q. Below Coal Creek how far?

A. It strikes the bluff.

Q. That is Ft. Pillow, is it not?

A. Yes, sir.

Q. Is that ground in there on Old River called by any particular name?

A. The accretions?

Q. Yes.

A. No, sir; not that I ever heard.

Q. Did you ever hear it called Flower Island?

A. I heard tell of Flower Island, but not knowing exactly where it was, of course, I can't say. It seems to me that the accretions at the mouth of Coal Creek has all been made in time, it is nice smooth land. It didn't look like it was ever Flower Island?

Q. When did you know Flower Island?

A. I only heard of it, I never was on it. I was from the east side of the river.

Q. When was that?

A. 50 years ago.

Q. Where was it with reference to Coal Creek?

A. I can't exactly locate it. It was up the river, some distance up, it was somewheres above Coal Creek.

Q. On which side of the river was it on, on the Arkansas or the Tennessee side?

A. I can't say from my own knowledge.

Q. You saw the island, didn't you?

A. I have saw it from a distance.

Q. Where was it located with reference to the main channel of the Mississippi river?

A. The time was when you could stand at Fulton and look up the river and see the lights.

Q. How far was it?

A. I can't tell, it is on the water, and I can't tell.

Q. Is there any part of Flower Island you could see in those days there now?

A. I have been over what is called the accretions and I have never saw anything yet that looked to be land made fifty or sixty years ago. It all seems to me to be young timber, there's no old timber.

Q. Cottonwood?

A. Yes, sir; cottonwood.

Q. You have been all over the land?

A. No, sir; not all over it.

Q. You knew that place fifty years ago?

A. The first time I ever saw the Fortner place it was fifty-five years ago.

Q. Where was the Fortner house located with reference to Ft. Pillow?

A. Five miles below Coal Creek and a mile or more above Ft. Pillow.

Q. Is the mouth of Coal Creek and Ft. Pillow the same?

A. Ft. Pillow is on a high bank.

Q. On a high bank?

A. Yes, sir.

Q. And Coal Creek in a valley?

A. Yes, sir.

Q. Do you know a lake called Crutcher Lake?

A. Yes, sir.

Q. Where is it?

A. As well as I can locate it now, sir, it is about three or four miles up the bottom.

Q. How far did you say it was up Coal Creek?

A. I have traveled it horse back and it is about three or four miles.

Q. Do you know how far this Woodfolk tract extends up above the mouth of Coal Creek?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. Look at that map with reference to Crutcher Lake and see if it lies down towards Coal Creek as you understand it?

(Witness locates Crutcher Lake on the map.)

Cross-examination by Judge Heiskell:

Q. You say Polsdorfer saw but the 400 acres when you sold to him?

A. I don't know that, I went over that with Mr. Polsdorfer, and Mr. Stroud showed Mr. Polsdorfer the other.

Q. You really don't know that?

A. I don't know whether it was Polsdorfer or his son, but Stroud went over the land with him.

Q. You stated that the Fortner cabin was on this land when you bought it?

A. Yes, sir.

Q. When was that?

A. I don't know the date.

Q. Don't know the date? Well, about what time was it?

A. In 1891.

Q. Do you know how long Fortner had been there?

A. I don't know, sir.

Q. Did Fortner live there the next year in 1892?

A. My recollection is that I taken possession.

Q. Did Hobbs vacate sometime in November, of 1891?

A. I think he did, in November, '91, or December one. It was in the winter. Fortner next spring vacated when the water came up and he moved down to my mill and got some timber out for me.

Q. He wasn't on the land in dispute so far as you knew after 1892?

A. The spring of 1892 he wasn't on it.

Q. Then there was nobody on it in your knowledge in 1892?

A. I don't know, I heard something about somebody being there.

Q. You don't know yourself that anybody was there, you just heard of some one being there?

A. I think there was somebody living there.

Q. You say you think, what do you know about that? I understood you to state in your examination in chief that you didn't know positively whether there was anybody there.

A. I think there was somebody there.

Q. Where do you think they lived?

A. In the cabin.

Q. In the cabin?

A. I had to pass there occasionally and I think that summer after Fortner left somebody lived there in the house.

Q. Did that somebody go in as soon as Fortner moved out?

A. I think he did.

Q. I am asking for your personal knowledge.

A. I can't say. It is my recollection that they did.

Q. You say there is no old timber on that island?

A. No old timber on the island?

Q. On what is called the accretions?

A. On what is called the accretions it is all young timber.

Q. It is also called Flower Island?

A. Yes, sir.

Q. Have you been over a good part of it?

A. Yes, sir.

Q. Do you know whether there is large timber around Krutcher Lake or not?

A. I do not know. I had timber cut in there but I don't know how large it was.

Q. Then you didn't see it if it is there?

A. That is around Krutcher I haven't saw it. I never saw any timber on Krutcher Lake that measured over twenty-four inches.

Q. After you pass Crutcher Lake going up to Coal Creek you did see some big timber?

A. I meant Crutcher, around Crutcher I never saw any big timber there.

Q. In other words if there is any large timber you don't know it?

A. I don't know it, no, sir.

Q. How far is it from Crutcher Lake to the original river?

A. Do you mean to the bank of Old River? I don't know.

Q. Well, is it a mile or two miles?

A. I expect it is about a mile or two.

Q. Now, is it not a fact that down from Crutcher Lake there is a gradual decline and there are pools of water every two or three yards when the water is high?

A. My recollection is, that from what is called the mouth of Old River it is between a quarter, it might be a half of mile, my recollection is that this is smooth, level, nice ground, with no sloughs or lakes on it until you strike Crutcher Lake it is all smooth land.

Q. My question is this: Is it not a fact that from Crutcher Lake to the Tennessee shore that the land gradually slopes and it is filled with small lakes and running water?

A. I can't answer that question for I don't know.

Q. Isn't there a ridge that leads from Coal Creek up?

A. I have traveled that land but I don't recollect.

From the mouth of Old River near my mill it was smooth land until you reached Crutcher Lake.

Q. Did you ever see a tree that you have measured 30 inches at the stump over there?

A. No, sir.

Q. When you bought, what did you mean by saying you took possession?

A. Well, what I meant by that Hobbs had a mill there.

Q. I am speaking about when you bought?

A. Well, I was going to explain what I called possession, when I had to take possession of his business I taken charge of the mill. I was cutting timber on the 400 acres of land when I sold to Polsdorfer and I had to hire a man and I was carrying on the business on my own land, and I taken the Hobbs contract and was running it when I sold.

Q. Your mill is not on this land?

A. No, sir.

Q. Nor on the 5000 acres?

A. No. sir.

Q. There at Coal Creek there is a bluff on which Ft. Pillow is located, now these accretions begin there do they not?

A. There is no accretion at all there at Coal Creek.

Q. None at all?

A. No, sir.

Q. A hundred or two yards above the mill, just above the mill or where it is, is not there not to-day enough water in the slough that will almost float a steamboat? Between the Tennessee shore and the land here in dispute?

A. It has been several years since I saw it and I never expecting to have to say anything about it, didn't notice particular; but when I done business there, just opposite or above the mill there was a little drain and a little bank there six or seven feet high, when it was running it run out water like there might be a spring in the bottom, there is something there, a hole of water.

Q. Is that called Fish Lake?

A. No. sir.

Q. Does not Old River begin about this time to rise and until March is it not so that a steamboat can run on it?

A. In high water, if the timber is cut boats can run.

Q. Well, can't they run there now?

A. No, sir. No, sir; when I was doing business there this time of the year when there was no running or back water there was no water there at all.

Q. And was perfectly dry?
A. It was perfectly dry in the summer time.
Q. At the mouth?
A. What do you mean by "at the mouth"?
Q. If it is dry at the mouth it is dry all the way up.
A. There is some water above that called Cotton Lake.
Q. Did you ever go up what is called Old River?
A. No, sir.
Q. From your mill up to where Old River is?
A. No, sir.
Q. Never did?
A. No, sir. I am just telling you what I know.
Q. You say fifty years ago you could see Flower Island standing out in the river? How far is it from Fulton?
A. About two miles.

Cross-examination by Judge Flippin:

Q. You said about fifty years ago you could see the lights upon the old island from Fulton, can you see the lights from the present island from Fulton?
A. I can't tell you, I have never noticed.
Q. You speak of having cut some timber on this land, did you ever cut any timber on the land that is said to have been accreted?
A. Yes, sir.
Q. What was the size?
A. From 24 to 28 inches. There was very little of it.
Q. How does the timber on this accreted land compare in size with that on the Tennessee shore?
A. That on the Tennessee shore above what is considered Old River is from three to five feet through the trunk, showing that it is very old. There is some there now from three to five feet through the trunk.

Re-cross examination by Judge Heiskell:

Q. There is a tree there, it is a large cottonwood?
A. I can't tell you.
Q. It is an old tree?
A. I think so.
Q. Sixty or seventy years old.
A. I expect it is.
Q. Were you with your employes, your men who cut out the timber for you?
A. I didn't stay with them but came along one day and stayed two or three hours.
Q. What were you doing with that timber?
A. Running it through the mill I had on Coal Creek.
Q. For the Memphis market?

A. Any market that wanted it.

Q. You say they didn't cut any for you that measured over 30 inches?

A. That is what I said.

Q. Did you measure it?

A. I didn't measure it, but I had it measured. I can guess pretty close without measurement.

Q. And was your particular attention called to the size of the logs?

A. I didn't measure it because they only got in about 60,000 logs before here come high water and we didn't cut up but about 50,000 logs.

Q. Did I understand you to say that you know of your own personal knowledge it was cut above or below Crutcher Lake?

A. They call it Crutcher Lake. That is what they call it, the timber in there. I went by what the timber men called it.

Q. My question is: Do you know of your own knowledge that this timber was cut at Crutcher Lake or below or above Crutcher Lake?

A. I know this, they were going out and cutting it two or three hundred yards and putting it in it.

Q. That is what I want to know.

J. H. Polsdofer, the plaintiff, testified as follows:

Examination by Mr. Randolph.

Q. Mr. Polsdofer, you are the plaintiff in this suit?

A. Yes, sir.

Q. Do you remember when you first negotiated for the purchase of this land from Mr. Marley and Mr. Williams?

A. Yes, sir.

Q. Where were you living at the time?

A. Evansville, Indiana.

Q. At the time the negotiation commenced where were you?

A. I had heard of some dry lumber for sale at Ft. Pillow.

Q. Well, what did you do to it?

A. I went down there to look at it.

Q. You went down to Ft. Pillow?

A. Yes, sir.

Q. You went down there?

A. I went first to Ripley.

Q. Who did you meet first when you went to Ripley?
A. Mr. Williams.
Q. Then what occurred?
A. I went and looked at the lumber.
Q. Williams had a mill?
A. He had control of a mill.
Q. What else did you do down there at that time?
A. We made a trade in the lumber.
Q. When was that?
A. In 1891.
Q. Do you know the month?
A. I don't know the exact date, but it was late in the spring or the first part of the summer.
Q. Then you went home?
A. Then I made arrangements to get the flatboats and take the lumber away.
Q. Then what did you do after that?
A. I also rode out to look at the property with a view to buying it.
Q. Buying it from whom?
A. Well, I talked to Williams and subsequently bought from Williams and Marley.
Q. Then what did you do?
A. They made arrangements that a man by the name of Stroud should take me over the property and show it to me, and saying that he understands the land, the lay of the land and the timber, etc.
Q. When did you go to look at the land?
A. After we got the flatboats loaded I stopped some two or three days and went with Stroud to look at the property.
Q. Anybody with you but Stroud?
A. No, sir.
Q. Do you remember when that was?
A. In 1891.
Q. You looked at the land?
A. He took me over a large portion of the land and showed me the lands and pointed them out to me, and the timber too, pointed out the timber and the quality of the timber and the quantity of the timber; and pointed out and showed me where the various water ways and lakes and sloughs and so on were on the lands.
Q. Well, look at that map before you—
A. He also showed me the creek and that it contained running water through the land and the convenience it afforded for floating the timber off the land, and the mill and the advantages of that mill site and the guarantee and conditions of the mill and the connected with

the mill and the lumber and the creek below the mill as giving facilities of shipping and then he took me across the creek below the mill and said those were the accretions called Flower Island.

Q. Well, he showed you the land?

A. Yes, sir. And pointed out where Old River had left its banks and where the river was at that time; and showed me the difference between the land; and took me up some mile above these accretions and pointed out the difference between the Old River part and the new; and pointed out large stumps and said Mr. Hobbs had cut a lot of timber when the river was high; and then he took me up and showed me a small cabin and told me a family lived there named Fortner.

Objected to by Judge Flippin.

Objection sustained.

Q. You went with Stroud to examine the land?

A. Yes, sir.

Q. And he took you to the Fortner cabin?

A. Yes, sir.

Q. Who did you find in the cabin?

A. Fortner.

Q. You found Fortner there?

A. Yes, sir.

Q. And the family?

A. Yes, sir.

Q. What was he doing there?

A. He was living there?

Q. In 1891?

A. Yes, sir.

Q. What time in the year?

A. About the time I was down there in the spring or early part of the summer.

Q. You looked at the land at that time?

A. Yes, sir.

Q. Did you make any contract?

A. No, sir, not right away.

Q. What did you do?

A. We talked about it and we couldn't agree on the price and we dickered on it.

Q. Well, you finally did make a trade?

A. Yes, sir, we made a trade in 1892.

Q. In 1892?

A. Yes, sir.

Q. In July, 1892?

A. Yes, sir.

Q. Well you made a trade with Marley did you?

A. With Marley and Williams.

Q. With Marley and Williams?
A. Yes, sir.
Q. With Williams too did you?
A. Yes, sir.
Q. Is that the deed from Williams to you?
(Hands witness paper.)
A. Yes, sir.
Q. Now what is this?
(Hands witness a paper.)
A. This is the deed from Mr. Marley to me.
Q. From Mr. Marley to you?
A. Yes, sir.
Q. After you got those deeds what did you do with reference to the lands?
A. I took possession of them.
Q. Immediately?
A. Yes, sir.
Q. That was in July, 1892?
A. Yes, sir.
Q. Who has been in possession since that time?
A. Fortner had possession for a year or two, that is he had his things in the house.
Q. Then what occurred?
A. The water got up so high and stayed so long it was sickly to stay in the bottom so he had to get out.
Q. And then what occurred?
A. Then my son he had possession of this property. One year he raised a little crop on the place.
Q. Lived on the place?
A. Didn't live on the place, I gave him possession of it.
Q. Then what happened?
A. One season I had the mill going and I had the man who was there at Coal Creek to stay on the place.
Q. Then what occurred?
A. Then another season the water got up and it was sickly for anybody to stay on the place, then up to two years ago I gave a lease on the place and leased it to J. Bell and Walter Sanders.
Q. What land do you speak of?
A. I meant the accretions.
Q. Look at that map before you, who made that map?
A. I made it myself.
Q. What from?
A. From a copy that Mr. Marley gave me before I bought.
Q. Before you bought?
A. Yes, sir.
Q. After you bought, you say?

A. Yes, sir. After Stroud showed me the place I wrote to Mr. Marley to give me a map so I could get a better idea of what they had to sell and so they gave me a map of which this is a copy. Soon after I bought and took possession I was endorser for a concern in Evansville and it was about to fail and I had to go up there, go up home, and I sent my son to take possession of this property and he looked after the land and when I came I asked him for a copy of the Marley map and I took this piece of paper and tacked it on a board and tacked the Marley map over it and then I took a pin and punctured the lines just like it is here, there are some on this paper, and after I had punctured all those lines I took a pencil and traced it and gave this to my son that is the copy of the original Marley map had to go back to him. In 1893 I was looking over the map and there was one or two points not clear to my mind and I took the map and a pencil and put some cross lines on it and sent the map to Marley in confidence and asked him to explain to me those places where I had made the cross marks and to return to me the map and the information.

Q. Never mind. You didn't get the map back?

A. No, sir.

Q. And that is a copy?

A. Yes, sir.

Q. Is that a substantially correct description of the land you bought from Mr. Marley and Mr. Williams?

A. Yes, sir.

Q. The original you let Mr. Marley have and that is a copy?

A. Yes, sir, it is a copy made in that way.

Q. Is there anybody in possession of that land of late years?

A. No, sir.

Q. What is the use of this?

A. One time when the water had been up my house was empty and somebody had moved into it and my son—

Q. Don't tell what your son did. Did somebody go on the land?

A. Yes, sir.

Q. Who did?

A. I don't know?

Q. Did he cut timber?

A. No, sir.

Q. What did he do?

A. I don't know.

Q. How did you get him out?

A. My son got him out.

Q. Well, he got out?
A. Yes, sir.
Q. How long ago was that?
A. Some three or four years ago.

Cross-Examination by Judge Heiskell:

Q. You say you found man by the name of Fortner in the house after you bought it?
A. Yes, sir.
Q. What is his name?
A. Fortner.
Q. Fortner?
A. Yes, sir.
Q. You say he stayed there how long?
A. To the best of my knowledge—
Q. That is not what I asked you. How long did he stay there?
A. That is what I meant to tell you.
Q. Well?
A. I wasn't there.
Q. But as a matter of fact you stated in your examination that Fortner lived there one season.
A. He lived there at the time when I went to look at the land. That might be.
Q. No might be's, I am stating what you stated.
A. I went there and people were living in the house and they told me that the Fortners lived there.
Q. Then you do not know of your own personal knowledge? Then you stated what you didn't know? You do not know when he lived there?
A. No, sir.
Q. You say W . went in?
A. My son said—
Q. Well, you don't know as a matter of fact do you?
A. No, sir.
Q. Then after a year or two there was nobody on the island? That is right is it not?
A. As far as I know it is.
Q. You bought in 1892, then Fortner stayed that year according to your statement, and then he left, you do not know how that was, however, that would be 1893, then W . stayed for 1893, then after two years there was nobody there and then after that you made a lease to the parties who are there now?
A. Yes, sir.

Cross-Examination by Judge Flippin:

Q. When did those last tenants of yours go in there, what year, if you know, not what your son told you or anybody else, but what you personally know. You made the arrangement?

A. The lease give me—

Q. This lease is dated October 10, by the parties?

A. The contract was made out again.

Q. Tell me when they went into possession under that lease?

A. They took possession in the spring of 1898.

Q. Then how many years before that lease was made that the property was vacant? Immediately before you gave that lease?

A. A couple of years.

Q. A couple of years?

A. Yes, sir.

Q. Who is the last tenant before those who had the lease took the place?

A. Well, only the party that I named, Calvin W. and his uncle.

Q. Do you know that as a matter of fact?

A. Only as a matter of correspondence with my son.

Q. You don't know personally who did?

A. No, sir.

Q. Who do you know personally did occupy those premises? Of yourself? Anybody?

A. I was here only a few weeks after I took possession I went home on some business.

Q. You do not personally know that anybody was in possession?

A. I gave my son possession. He took charge of everything. Took possession of everything.

Q. What do you mean by taking possession?

A. Well, he had to go there and take care of things I had to be away.

Q. Where is your son now?

A. Traveling.

Q. How long did he stay down there?

A. He was down there some couple of years.

Q. From what time?

A. Well, he began in 1893.

Q. He stayed until 1893?

A. '93 or '94.

Q. Where did your son live at that time?

A. At Ft. Pillow.

Q. He didn't live on the premises at all?

A. No, sir.

Q. How much of this land do you claim?

A. I claim commencing at Coal Creek and going north the part that this map shows.

Q. Do you go as far as what is called Yankee Bar?

A. Stroud took me as far as Crutcher Lake.

Q. Do you mean you claim what Stroud pointed out? He just pointed out some land and told you that was the land?

A. He pointed out the land and said that was the land he was selling me.

Q. Do you know as a matter of fact that it extends further west than the Woodfolk tract extends?

A. This map shows that.

Q. Do you claim then where the Woodfolk grant passes down?

A. I was buying what Mr. Stroud said was the land he had to sell.

Q. The land has never been surveyed and he had no other means of judging except by this map and going over it?

A. Yes, sir. We went over it.

Q. You know where Yankee Bar is?

A. I don't know.

Q. Have you ever seen it?

A. I have had it pointed out to me.

Q. Do you claim up as far as that?

A. I claim whatever this map shows.

Re-Cross-Examination by Mr. Randolph:

Q. This map shows doesn't it in addition to the calls of land here a large body embraced in those lands called accretions, doesn't it?

A. Yes, sir.

Q. You claim that?

A. Yes, sir.

Q. That is what he has been trying to get you to tell. You claim the accretions?

A. Yes, sir.

Q. How many acres in those accretions?

A. It has not been accurately surveyed.

Q. Has it been estimated at 3000 acres?

A. Mr. Hobbs told me about 3000 acres.

Q. Is that 3000 acres outside of the 5000 measured in the land?

Re-Cross-Examination by Judge Flippin:

Q. Your son remained away from home about two years?

A. Yes, sir. I think it was.

Q. You corresponded with him at Ft. Pillow?

A. Yes, sir.

Q. What year did he leave Ft. Pillow?

A. I am not positive but I think he was there some two or three years or more.

Q. You bought in 1892? When did your son go there?

A. About six or eight weeks afterwards.

Q. And stayed two years?

A. Yes, sir.

Q. And after you bought this land you went and found Fortner there?

A. I went there and there were some things in the cabin and they told me they belonged to Fortner.

Q. After you bought you went and found his things in the cabin?

A. Yes, sir.

Q. Was there anybody there when you found his things in the cabin?

A. No, sir.

Q. Do you claim anything at all to the west of Crutcher Lake?

A. I claim just what is on that map.

Re-cross examination by Judge Heiskell:

Q. You claim that this land that you are suing for was an accretion to the 5000 acres, and that you bought the 5000 acres and the accretions to the 5000 acres and the 400 acres. That is your claim?

A. That is all of it.

Re-cross examination by Mr. Randolph:

Q. Then you paid the taxes on that land? Didn't you pay them?

A. On the accretions?

Q. On all the grants?

A. Yes, sir.

Q. Where did you pay them?

Objected to by Judge Heiskell.

Objection overruled.

Q. Have you been assessed for taxes on that land?

A. Yes, sir. In Lauderdale County.

Q. Have you paid them?

A. Yes, sir.

Q. How long have you been paying them?

A. Ever since I had possession of that property.

Re-cross examination by Judge Heiskell:

Q. Where are your tax receipts?
A. At home.
Q. At Evansville?
A. Yes, sir.
Q. At Evansville?
A. Yes, sir. I had them read and they give certain descriptions.
Q. They give certain descriptions? How many numbers of acres do they call for? Don't they call for 5000?
A. I can give evidence that I paid my taxes.
Q. How much did you pay?
A. In money?
Q. Yes, in money each year?
A. I haven't paid this year's, but I have paid as much as $150.
Q. On what?
A. On that and other property I have.
Q. I meant those tracts of land?
A. I have paid taxes only on that I have been assessed on.
Q. That includes the 5000 acres and the 400 acres from Williams and the 70 or 30 acres and then the 70 acres at Ft. Pillow? Does it?
A. Yes, sir.
Q. Only that?
A. No, sir, personal property, too.
Q. What other property?
A. Only what I have stated.
Q. Is that a fact?
A. Yes, sir.

The Court:

Q. As a matter of fact, has an assessment ever been made on that 3000 acres separately against you?
A. No, sir, because I couldn't get possession of it.
Q. It never has been assessed?
A. I couldn't tell, because I never got possession of it.

(Judge Heiskell continues.)

Q. You say you never had possession of it?
A. No, I didn't say that.
Q. What did you say? You did say you hadn't got possession.
A. I didn't get a quit-claim.

(Judge Hammond:)

Q. Does the Marley deed call for a quit-claim?

(Mr. Randolph:)

A. Yes, sir.

(Judge Heiskell continues.)

Q. The assessor came to you to make a return of the property that you should pay taxes on, didn't he?

A. Not to me personally. He made the assessment himself.

Q. He made the assessment himself?

A. Yes, sir.

Q. You never did return this property here to the assessor of Lauderdale that he might assess you for taxes on it, did you?

A. No, sir.

Q. Did the assessor in Arkansas ever call for any assessment?

A. No, sir.

Q. Was the sheriff the assessor?

A. Mr. P. collected some taxes.

Q. In what year was that, please, sir?

A. Some two or three years ago, I don't recollect.

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(16) Capt. Marsh Miller, a witness for the plaintiff, testified as follows:

Examination by Mr. Randolph:

Q. Do you know the premises in the vicinity of Ft. Pillow and above there?

A. Yes, sir.

Q. How long have you known those premises?

A. Ever since 1839.

Q. Ever since 1839?

A. Yes, sir, ever since September, 1839.

Q. What has been your business from 1839 to now?

A. Pilot and commander of a steam boat.

Q. On what river?

A. On the Ohio and Mississippi rivers.

Q. You have been passing there off and on until now?

A. Yes, sir, it has been about two years since I was up there.

Q. Please look at this map, Capt. Miller, and tell what it is.

A. I give my testimony on that some time ago.

Q. Did you draw the map or did somebody else do it?

A. I think it was a copy from a United States map.

Q. Did you copy it or did somebody else do it?

A. Capt. Drouillard did it.

Q. Is Capt. Drouillard dead?

A. Yes, sir.

Q. What does that represent? (Show witness map.)

A. That represents Flower Island and the river as it was when that map was made.

Q. That map?

A. Yes, sir.

Q. Some of the locations there that represent that?

A. It is a correct map excepting with—

(Could not hear the answer to this question.)

In the river here there is Flower Island. (Witness points it out on the map.) I think that there ought to have been three maps from 1839 up to the present day to represent everything there was to my mind.

Q. But you haven't any map but this that you would show the changes?

A. No, sir, I have some old maps at home, but they are too old.

Q. Now, you notice in the channel of the river apparently there is an indication of a land mark, 33 Flower Island?

A. This represents Island 33.

Q. That represents Island 33, does it?

A. Yes, sir, represents Island 33 and marked Flower Island.

Q. Island 33 and marked Flower Island?

A. Yes, sir.

Q. Are there two islands there?

A. Two tow-heads.

Q. What are they called?

A. One was called Craig Head tow-head.

Q. Craig Head tow-head?

A. Yes, sir.

Q. Well?

A. And two heads laid along close to the Island 33, and that was along when I first commenced on the river and those laid near the Arkansas shore with Island 33.

Q. What heads?

A. The two tow-heads. The channel then went close to what they now call Osceola, and there was a wood yard over there, and then it crossed over to another high dry bar and run down the shore, that indicates the slant in the land (points out on map), and then there was a little caving there.

Q. There was a caving bank?

A. Yes, down here opposite the island there was a little place just commenced, a little filling, and a chute and

little willows, all in there, just little willows and small growth, and I suppose that there where that high point is the boats bore off a little and passed the bluff and at the foot of the island there was a chain of lakes, and this one here was called Center Lake, and sometimes we went to the right of that and sometimes to the left of it.

Q. That is the shore, the Arkansas shore? (Points to place on a map.)

A. Now, this land in here and this chute of the river was fully two-thirds of a mile from the island over this way. (Witness made all of the above indications on a map.)

Q. Now, Capt. Miller, this way or I will ask you what does that cover?

A. In '39, '40, '41, '42, '43, '44, in my opinion, the big rise of '44 changed the river from the Tennessee side of Flower Island and changed it and went up and above the head of Island 33, and went down into the chute of Coal Creek, made a little bit of narrow concern and changed from the Tennessee shore to the Arkansas side and went down that way and continued that way in '46, the fall, winter and spring of '46-7 I was on the Cincinnati line, and went on passing there. And one-half the way between the Arkansas and Tennessee shores there was a wood yard, and one day we were passing there and I felt something was wrong, the boat kinder jerked and the captain said to me, "Did you feel that earthquake?" In the summer of 1856 I went on a new boat called the "Tom Kirkman," and it continued along in the fall late, and the channel had changed from the crossing from Malone's wood yard there to Craig head and left the land came in just between—

Q. Ft. Pillow?

A. Osceola. And here went down the bend at Osceola, and here where it shaped out a little and went all the way, and the river changed then and went down between these two tow-heads and between Craighead and lying between Flower Island and went down that way and the channel went down next to the head of that and washed that way and continued washing until 1850, and was all washed away then.

Q. Was it all washed away?

A. All of it.

Q. Until it became the river there, did it, in 1850?

A. I was on a steam boat plying to New Orleans, and it was all washed away.

Q. In 1839 the channel was on the Tennessee side of Flower Island?

A. Yes, sir.

Q. Afterwards the channel strikes the head of the Island on the Arkansas shore and it commenced washing which way?

A. After the channel commenced leaving it came out just below Malone's crossing at the head of the island on the Tennessee side, then went back on the bend and then afterwards changed, as I say, and went back to Malone's.

Q. Where was Malone's woodyard? Was it on the Tennessee or Arkansas side?

A. On the Tennessee side.

Q. When the island was washing so h[illegible]e mud bar on the Tennessee commenced making?

A. The mud bar commenced before that time to form on the Tennessee side.

Q. On the Tennessee side?

A. The land kept a little wood and there was a little ridge that run on—and I suppose it is a mile or more above Ft. Pillow or Randolph, or what is it?

Q. Fulton?

A. No.

Q. Osceola?

A. No.

Q. Above Coal Creek?

A. Coal Creek now. It is not where the mouth of Coal Creek was in 1839, it is changed.

Q. Can you tell to the jury where that mud bar commenced forming? As well as you can remember?

A. Well, if I was on the ground I could.

Q. Well, look at this map, where is it?

A. Well, sir, right about there. (Witness locates on the map the point in question.)

Q. And the Fortner house, where was that?

A. Well, about there. I wouldn't be surprised if that wasn't it right there.

Q. Just about where this is marked Fortner House?

A. Just about there.

(Judge Heiskell:)

Q. That is on the original shore?

A. On the original shore. Then the channel came above.

(Mr. Randolph:)

Q. How far above Capt. Miller?

A. Considerably above the island then, but fully abreast Craighead point.

Q. You mean what is marked Craighead Point?

A. Yes, sir. Here is where it was, just about here. (Witness continually points out on a map the locations asked for by the lawyers.) The formation commenced at Fortner House on the Tennessee shore, and the island was above the house. This point commenced at Craighead Point.

Q. What did that formation do?

A. It kept increasing—the formation on the Tennessee shore as the island gave way, at the time the channel was on the Tennessee side—it kept increasing and that was the foundation of all that accretion.

Q. All of that accretion?

A. The whole of it. It grew as the island washed away.

Q. You said in this deposition that the mud bar extended about where the house is designated to be, where Fortner lived, and extended above the mouth of Coal Creek on down—the mud bar?

A. Yes, sir.

Q. Was there a formation, or, state whether or not there was any formation there when you first knew the country?

A. On the Tennessee in 1839 there was a little formation of little willows growing up and such small growth, and I was there in the fall and I suppose they were that high, in front of where this man had his wood yard, and we had to stop back a little further and went back to the shore.

Q. There was a wood yard in that vicinity, that where the house now is?

A. Yes, sir.

Q. Are you familiar with the formation of the land in and about the Mississippi river?

A. Yes, sir.

Q. These things are not all alike, but the general way a formation commences, how is it? Begins a little from the shore and gradually fills in between the formation and the shore?

A. It generally commences that way, and sometimes it commences during high water and sometimes it commences at the low stage of water.

Q. Is the higher land usually close to the water or from the water?

A. The water recedes from it.

Q. Is the formation always of the same level?

A. No, sir, sometimes there is a little slough and little high places and little low places; sometimes it is close to the water, and sometimes far from the water; and some-

times more or less of a drain of some sort or another to take off the water.

Q. Part slough and formation, is it?

A. Yes, sir.

Q. Did the main channel of the river ever run on the east side of what was Flower Island?

A. Flower Island?

Q. Yes.

A. It run on the east side when I come on the river. That was the Tennessee shore.

Q. Now, did it ever—— You have noticed the Fortner House yourself on this map? Did the Tennessee channel ever run east of that house?

A. No, sir. My father learnt me the river—

Q. I will ask you this question: Was the land on which that house stands connected with the main shore when you knew it?

A. Yes, sir, from all appearances of it.

Q. That was so—

A. Well, there was a little house there.

Q. How many times would you pass up and down these premises from 1839 to 1860?

A. About twice a month. Now, when I was plying from Louisville to Memphis and New Orleans it was twice a month, then plying in the packet trade above there it was twice a week.

Q. You were a pilot?

A. Yes, sir.

Q. What was it your duty to do with reference to the shore?

A. It was my duty to know the shore line and the river and to keep well abreast of the changes.

Q. You had to know where the land was and how far it went?

A. I had to know all of that?

Q. This information is required in your business?

A. It is required in a man's business to know all of that.

Cross-examination by Judge Heiskell:

Q. Where is the Fortner house?

A. I know where there is a place called the Fortner house. It is above Ft. Pillow.

Q. Do you know when it was put up there?

A. No, sir.

Q. Do not know the fact to be that it was built in 1844?

A. I do not know, but there was a little cabin there when I commenced piloting.

Q. Well, then, that couldn't be the Fortner house if it was built in 1844?

A. I don't know, there was a little house there, a sort of little cabin.

Q. Then when you speak to the jury of what Mr. Randolph calls the Fortner house you speak of the house that was there in 1839?

A. There was a house there, a little house.

Q. How far was that at that time from where Flower Island was at that time?

A. It was about as far from Flower Island as from here across the river. All that part of the country was woodland then. And there was a wood yard in there.

Q. At that time two-thirds of the river, the Mississippi river, ran between Flower Island and the Tennessee shore, didn't it?

A. This little cabin I am speaking of that I knew in 1839 was a one room concern like all woodmen would have when they are commencing to keep for his hands in there—

Q. Now, at that time, wasn't two-thirds of the Mississippi river running between Flower Island and the bank of this wood yard?

A. Nearly two-thirds.

Q. The island laid on the Arkansas side, didn't it? And isn't it a fact that in low water you could ride a horse from Osceola to Flower Island?

A. From Plum Point in 1839 it might have been you could have done so.

Q. Well, couldn't you have ridden from Osceola to the island, too?

A. I don't know, I never tried.

Q. You didn't run any steamboat there?

A. No, sir, on the other side.

Q. At that time, between low water, there between Flower Island and the Arkansas shore?

A. No, sir.

Q. Couldn't do it?

A. No, sir, there was a change in the channel—

Q. Then you think in 1839 to 1844, along in there, there was a change in the channel of the river which threw the body of the river over towards the Arkansas side of the river?

A. Yes, sir, when it changed it come out from the Tennessee shore into the head of Island 33, on the Tennessee side, and then went back and then afterwards

changed and went back above the head of that island into Craighead Tow-head.

Q. Yes. What did you say happened in 1846? You mentioned something that occurred in 1846, about an earthquake.

A. It was in the night and I had the run, and I was going along and the boat shook and I could hear the timber falling and the caving bank above, and the boat shook so I had to stop the engine, and when I went over to Malone's wood yard they asked us if we heard the earthquake.

Q. You were then on the Tennessee side?

A. We was crossing at Craighead Tow-head, out to the Tennessee about one-half the way.

Q. Was Malone's woodyard above—north or south of the little cabin.

A. It was above.

Q. North?

A. North was above.

Q. How far north of Flower Island was this little cabin that you speak of in 1839?

A. Where the wood yard was.

Q. Not the Malone cabin but the other cabin?

A. It was below the head of the island.

Q. There was a little formation there and a bank had caved and left a little tongue of land and that was the cause of the formation? And the little cabin was below the head of what was then Flower Island?

A. Below, yes, sir.

Q. Flower Island is No. 33, is it not?

A. Yes, sir. The Flower Island got its name from two flat boats sinking there that were loaded with flour.

Q. Do you remember when that occurred?

A. No, sir; I forget when it was.

Q. Do you know the size of the island in 1839?

A. It was a good big island.

Q. Can you give some idea of how many acres in it?

A. A man looking at a piece of ground from a steamboat can't form much of an idea of the number of acres but it was a good big island.

Q. Were you ever on the island?

A. Once or twice.

Q. That was when you were steamboating?

A. Yes, sir.

Q. Your observations were made when you were a steamboat captain?

A. Yes, sir.

Q. And you say the first time the island washed away entirely was in 1850?

A. It was about 1850. I was on the steamboat N— and the channel went down between the two tow-heads and was washed the tow-heads away and then went on to the head of the Flower Island and that was washed away; and the channel kept right down the shape of the island; and kept on until it went down through those little cottonwoods and willows that had grown and went in there above Ft. Pillow.

The Court:

Q. They have got another island they call Flower Island?

A. There is no such thing as Flower Island. No, sir.

A. No, sir.

(Judge Heiskell continues):

Q. An island didn't extend from Malone's to the foot of Flower Island?

A. It was washed away in 1850, all of what is now called Flower Island.

Q. Why is it now called Flower Island?

A. I don't know, somebody keeps it up?

Q. Where is Flower Island now?

A. On the Tennessee side close to the shore.

(Judge Hammond):

Q. Flower Island is No. 33, is it not?

A. Yes, sir.

Q. Is there any island called 33 now existing?

A. No, sir. Where they have located Flower Island is where the river was.

Q. When you first knew it?

A. Yes, sir.

(Judge Heiskell continues):

Q. There is Coal Creek pointing to a location on a map), you know the mouth of Coal Creek?

A. That was all river (witness points to a part of a map).

Q. All river?

A. All river in 1839?

Q. Exactly.

A. Now, you see this island came way up in here, that way, and ran in here; and here is Ft. Pillow—

Q. Here is what I wanted to ask you—

A. Hold on now, right about here is some rocks—

Q. That is opposite Ft. Pillow? Do you know the form that Coal Creek is now and that it runs way up into what you call those accretions; and that steamboats used to run up there?

A. They might have run there in high water.

Q. This Old River is there now and has been ever since you knew it?

A. I haven't been way up there with a boat and a boat could not run in low water in there.

Q. They couldn't run in there west of Flower Island during low water?

A. No.

Q. Do you know that to be a fact?

A. Certainly.

Q. How do you know that?

A. Because it was tried and they couldn't do it.

Q. I am speaking of what you call Old River?

A. There might be little ponds and pools in there, but—

Q. Well, you have been there and know it? You know it?

A. There was a little slough and water, but it was preponderous to think of running steamboats up there in low water.

Q. Does that Old River exist there now as it has since 1839?

A. It shows where Old River was, where it is filled up the banks of it in 1839.

Q. You still don't answer my question. My question is: Does not Old River exist there now and has it not existed there ever since 1839?

A. It shows the bank and the new accretions and the old accretions and shows where the river was.

Q. My question is: Is it not there now? Old River?

A. Where Old River was then you can see it.

Q. Has it not been there ever since 1839?

A. You wanted—you said that steamboats can go there in low water and I said "no."

Q. Did I say anything about steamboats?

A. Yes, sir.

Q. Is not Old River there now and has it not been there since 1839?

A. You now see where the Old River was, but don't find anything like a lake, and everything of that sort, you will see it on that, see it full of timber where it is marked Old River. The Old River is gone now.

Q. The Old River is gone?

A. What I would call Old River is not there. The river has left there.

Q. Then there is no Old River there at all?

A. It is grown up with timber; there is no water, it is just the bed of the river.

Q. The bed of Old River?

A. Old River.

Q. That is all. Let me ask you, Capt. Miller: Do you know when that old bed filled up?

A. It filled up from time to time, just from time to since the river left there up to the present day, and when the high water comes it either left more or took more of it.

Q. You do not know when it used to be river?

A. The accretions I saw in 1839 has been that way ever since.

Q. How often have you ever been up Coal Creek and Old River?

A. I was up there three or four times.

Q. From 1839 to this day how often have you been up what you call Old River.

A. I don't recollect. A steamboat man wants to keep out of there if he wants to keep out of danger. I went up there two or three years ago, and went over the ground. I was just traveling over the country.

Q. How often have you been there since 1850.

A. I don't know.

Q. As much as a dozen times?

A. Well, a half dozen times, about that.

Q. A half dozen times?

A. That would be ample.

Q. These formations when they begin at the bank slope off towards the water?

A. It is just owing to how the currents are. There might be an eddy—

Q. Frequently where there is an eddy near the accretion would build up more rapidly than at the other places, and generally that attachment between the main body of the land and the formation is a contiuous chain of land that is attached to this and went up where the eddy is going round and form Coal Creek? But as a general proposition where the land accretes to the shore the accretion gradually slopes from the land to the water's edge and keeps that up and the timber goes where the land forms. That is the idea?

A. Yes, sir.

Q. Do you know where Crutcher Lake is?

A. I do not know it by that name.

Q. Do you know any body of water, of water that is marked on this map of Flower Island?

A. There is ponds there and one from the formation made by the river, the channel of the river went in straight at the head of the island and then the chute formed a sort of eddy and it may be part of that.

Q. You do not know it by that name?

A. No, sir; there is hundreds of little places in there, I don't know the names.

Q. Do you know anything about Centennial chute?

A. Centennial chute? Yes, sir.

Q. State to the court and jury what it did.

A. It cut off a farm.

Q. What happened?

A. The river went there and cut off a body of land.

Q. Isn't it a fact that a man's farm that was then in Tennessee was cut off and the farm is now on the Arkansas side, although it was in Tennessee some years ago?

A. Yes, sir; that was about 1876.

Q. So then the man's farm is now on the Arkansas side of the Mississippi river? It did that, didn't it?

Cross-examination by Judge Flippin:

Q. Did Tennessee or North Carolina claim all of the land to the middle of the channel like Arkansas did?

A. The Constitution of 1896 fixed that as the middle of the channel.

Q. Have you any objection to telling how old you are?

A. No, sir.

Q. Haven't?

A. No, sir.

Q. What is your age?

A. Yesterday I have been living 77 years and four months.

Q. You were the commander of the celebrated Grampus during the war?

A. I was accused of that.

The Court:

I can prove that for I was with him on that boat.

(Judge Flippin continues):

Q. Are you familiar with the location of what is called Yankee bar?

A. Yes, sir; Yankee bar is where Island 32 turned bottom upwards.

Q. What became of Island 32?

A. It was sunk in an earthquake of 1812-13. That is what caused that to be such a low country.

Q. How far was Island 32 from, do you know, Island 33?

A. Nearly two miles, I reckon. Fully, it laid under Fletcher Point.

Q. How long since you saw this Yankee Bar?

A. Within a year, inside of a year.

Q. Do you know whether Yankee Bar is still connected with the Tennessee shore?

A. I think it is.

Q. That is part of the accretion to the Tennessee, is it not? How far up the river north of that Yankee Bar did these accretions to the Tennessee shore, up that direction extend (here a map was used)?

A. Where?

Q. How far did the accretions run up towards Plum Point? From the wood yard?

A. A few hundred yards.

Q. Do you know this wood yard of Malone's?

A. Yes, sir.

Q. Do you know anything about the Fletcher and Peale tract up there?

A. No, I just knew that there was a wood yard Malone kept and Fletcher kept a wood yard, too.

Q. Was this Malone's wood yard below the head of this island, Flower Island, or above it?

A. Above.

Q. Did I understand you to say that Island 33 was washed away and there was a formation commenced by a mud bar on the Tennessee side?

A. Yes, sir.

Q. How far did this bar commence projecting out?

A. Right where that wood yard was in 1839 when I went down there in the latter part of September, you could see the formation of those willows and cottonwoods growing up and there was a formation, as I said, and as that formation increased the island gave way and eventually we had to go into the slough and then into the (open) again and then the channel crossed over from Malone's wood yard into the chute at Craighead Tow-head and it was very narrow and boatmen were thinking the whole river would go down into that narrow place.

Q. You do not know Crutcher Lake?

A. Not by that name.

Q. It was a long lake formed by the Old River?.

A. There may be an Old River where Malone's was—a sort of lake or pool outside filling up.

Q. Was this point above that lake or below?

A. The first formation?

Q. Yes, sir.

A. That lake was above it.

Q. How far?

A. I don't know.

Q. A short distance?

A. A mile or two.

Q. You speak of a house you knew in 1839—

A. Down below the head of the island.

Q. I understand.

A. A little log cabin built out of logs not as big as my body, just like any woodman puts up when he is beginning a log cabin.

Q. That was on the Tennessee shore of the island proper?

A. On the Tennessee shore. There was a little ridge and it run in that way and there was a slough below it and then the slough came in below where the town of—

(Mr. Randolph):

Q. Osceola?

A. No, below there.

Q. Fulton?

A. No.

Q. Golddust?

A. Above that.

Q. Plum Point?

A. No.

(Judge Flippin continues):

Q. G—

A. Above G—

Q. Shaw's Bar?

A. That is above Shaw's Bar. There was a little slough went in there (witness locates the following places and points on a map). And in here they anticipated a cutoff through there into the drain where there was a slough here they anticipated a cutoff and years afterwards it did cut out an immense big channel about one-third of the distance from G—, then that was a little town situated inside where the chute was and above there, there was a big channel cut off.

Q. You don't know the fact that the Island 33 disappeared?

A. Yes, sir; long ago.

Re-cross examination by Mr. Randolph:

Q. Have you been above the mouth of Coal Creek on the Tennessee side within the past 10 years and were you in the house, the Fortner house, and if so please designate the place where the Fortner house stood?

A. Yes, sir.

Q. Well, please locate the place where the house stood?

A. At that time a field was on the bank of the river. Here just about there (witness locates on a map). And I just made the remark that this looked very much like the situation was in 1839 when we used to stop there for wood. And there was a little ridge run out that way and a field and it looked very much like that.

Q. In 1839?

A. Yes, sir. Now, here is Coal Creek (witness locates on a map).

Re-examination by Judge Heiskell:

Q. Capt. Miller, how far is the Fortner house that you speak of as having seen some ten years ago from the old original Tennessee shore?

A. I don't know, because I did not go out towards the bank, it was high water.

Q. Is it not a fact that it is higher?

A. I don't know about that. I just made a remark that this little field looked very much like the field where we used to get wood in 1839 and 1840. I didn't survey it and didn't go over the ground myself.

Q. How far is the Fortner house that you saw some ten years ago west of the Tennessee proper?

A. It isn't west at all.

Q. Well, how far is it from it?

A. I don't know.

Q. Well, a half mile or a quarter of a mile?

A. I don't know, because I didn't go over the ground, I just made this remark, it looked like the situation of 1839.

Q. You don't mean to state to this jury that it was the same because it looked like it?

A. No, it might and it might not be.

Q. How far is that Fortner house from the Mississippi river now?

A. I do not know. I didn't go out that way. I can't see it in low water, where the house is two years ago.

Q. Was it in high water that you were on the island some ten years ago?

A. Yes, sir.

Q. Where is this Island 32 that was on the Tennessee side of Flower Island?

A. That was above.

Q. How far above?

A. One or two miles.

Q. When did you say that disappeared?

A. In 1811 or 1812, my father told me it sunk in the earthquake of 1811 or 1812.

Q. You do not know that of your knowledge?

A. I wasn't there to see it, but my father taught me all about the river and the changes in the country there abouts, and, of course, my father wouldn't teach me wrong.

Q. You don't know of your personal knowledge that it washed away in 1811 or 1812?

A. That is the cause of that part of the river to be a rough part of the river.

Q. Was it Island 33 or 32 that washed away, you said something about 33?

(Judge Hammond):

He corrected that.

A. I say Island 32 my father said disappeared during the earthquake.

Q. When was that?

A. In 1811 or 1812.

Q. And when did Island 33 disappear? You say all of it disappeared in 1850?

A. It was wiped out body and soul.

Q. You don't know of your personal knowledge when island 32 was washed out entirely? You speak of some stones down about opposite Ft. Pillow, were they on Flower Island when you knew it?

A. No, Center Rock was half between the foot of the Island and the Tennessee shore, and on the Tennessee shore there was a point of the land lay to the extreme head of the island and below Coal Creek, and a little slope between them and a bank, and to my best knowledge, a rock and you could have walked across on those rocks to the Tennessee shore.

Q. Were they then on the Tennessee shore of Flower Island?

A. On the Tennessee shore and during the high water the steamboats used to go entirely around them rocks.

Q. Which side?

A. It was then on the Tennessee side.

Q. The rock was?

A. Half way between the Tennessee shore and the foot of the island. The island then was way over towards the Arkansas shore and there was a little house a few years ago over there on the bar and the lower part of Ft. Pillow where the fort was built, and this was nearly opposite those rocks and in ordinary water you can see the break of those rocks to-day.

17. J. E. Field a witness for the plaintiff testified as follows:

Examination by Mr. Randolph:

Q. Mr. Field, did you ever live on an island on the Mississippi river?

A. Yes, sir.

Q. Where on the Mississippi? What was the name of that island?

A. On Flower Island 33.

Q. On Flower Island 33?

A. Yes, sir.

Q. When was that?

A. I went there in 1847 and stayed '48 and '49.

Q. What did you do?

A. I was keeping a wood yard.

Q. When you left there what condition was the island?

A. Well, sir, it was caving pretty fast.

Q. Caving out where—

A. Pretty well all along the island.

Q. And you left and didn't go back any more?

Cross-Examination by Judge Flippin:

Q. How long since you were up there on what is now called Flower Island?

A. How long?

Q. Yes, sir, how long?

A. Well, I don't know.

Q. Well, one year or two years or three years, can't you tell?

A. Well, it has been some time since I was there, I lived there sometime ago and I have never been there since.

Q. How far do you live from there now?

A. Twenty miles.

Q. You haven't seen the island since you left there?

A. No, sir.

Cross-Examination by Judge Heiskell:

Q. When you left there in 1849, Mr. Field, how much of Flower Island was then left?

A. I don't know how much I suppose a 1000 acres.

Q. What was the name of the gentleman who owned it then?

A. J. C. Barnes.

Q. Did the Old River run all around the island to the Tennessee shore?

A. Yes, sir.

Q. How near the Tennessee shore had the island extended to at that time?
A. I reckon it was a mile.
Q. From the island to the Tennessee shore?
A. Yes, sir.

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18. Alexander Baker, a witness for the plaintiff testified as follows:

Examination by Mr. Randolph:

Q. What is your name?
A. Baker.
Q. Your given name?
A. Alexander.
Q. You have given a deposition in this case between H ——— and T ——— and J. C. Marley and others, have you not?
A. Yes, sir.
Q. Do you know this property in controversy between Polsdofer and these defendants here?
A. Yes, sir.
Q. How long have you known it?
A. 1854 was the first time ever I was on the island.
Q. 1854?
A. Yes, sir.
Q. Were you acquainted with an island in that vicinity known as Flower Island?
A. Yes, sir.
Q. Where was that island?
A. Above Ft. Pillow.
Q. What has become of that island?
A. The island where Uriah Hipp lived is washed away.
Q. What?
A. I say the island that was there when I was there in 1854 where Uriah Hipp lived all washed away.
Q. Do you know this land on the front of the Woodfolk grant now claimed by Polsdofer?
A. Yes, sir.
Q. What sort of land is that?
A. New made land.
Q. New made land?
A. Yes, sir.
Q. What is it made to? What shore?
A. I suppose it is made to the island.

Q. What island?

A. That is what used to be known as Flower Island, before it washed away.

Q. Does it attach itself to the Tennessee shore?

A. A portion of it does, sir.

Q. When did you first see it?

A. What, this formation?

Q. Yes, sir.

A. In 1863.

Q. You didn't see it as early as '49 or '50?

A. No, sir.

Q. Is all that land there now attached to the Tennessee shore?

A. Yes, sir.

Q. Where does the river run?

A. It runs on Arkansas land.

Q. West of this land?

A. Yes, sir.

Q. How long has the river run there?

A. I don't know.

Q. Was it running there when you came there?

A. Yes, sir.

Cross-Examination by Judge Heiskell:

Q. This is your deposition that you gave to this cause, is it not, sir, Squire Baker?

A. Yes, sir.

Q. Now when you stated to Mr. Randolph that the island where Hipp's place was, was washed away where was he living?

A. Just above Ft. Pillow.

Q. Where was the Hipp house? Below Crutcher Lake?

A. A good piece below.

Q. Now the island up above where Hipp lived is what washed away?

A. I don't know about that, there was a back bone ridge there when I knew it in 1863.

Q. A back bone ridge was there in 1863?

A. Yes, sir.

Q. The island above Hipp's house washed away and you don't know whether it washed also?

A. I don't know anything about that part of it.

Q. When you were there did you notice the timber? What was the size of it in 1863?

A. It was small timber.

Q. Was all of it small?

A. I don't know, sir.

Q. You recollect that the general run was small timber?

A. Yes, sir.

Q. You didn't state to the jury that all of it washed away, did you?

A. Not that back bone ridge.

The Court: Unless the practice has been changed the rule is that a witness within a hundred miles of the court or in attendance of the court must appear, his deposition can not be read.

Judge Heiskell: There is a new act of Congress which authorizes according to practice. The old rule was that every party in a case was entitled to the oral testimony of the witness if he lived within a hundred miles of the court his deposition can not be taken only under exceptional circumstances and if he came within the one hundred miles his deposition can not be read in court.

Where the party lives within the county and you take his deposition you are bound—

The Court: I will say to Judge Heiskell that the one hundred mile rule is the rule always in this court and if the witness was present you couldn't read his deposition.

Cross-Examination by Judge Flippin:

Q. You say the Hipp house was a good way below Crutcher Lake?

A. Yes, sir.

Q. When did you last see the Hipp house?

A. The fourth of July, 1863.

Q. In July, 1863?

A. Yes, sir.

Q. You never saw it after that time?

A. No, sir.

Q. Never saw it?

A No, sir. It was gone when I came back in 1866.

Q. Did you see it then?

A. No, sir.

Q. It wasn't there in 1866?

A. No, sir.

Q. I understood you to say there was a ridge on the island?

A. Yes, sir.

Q. Where do you live?

A. Golddust.

Q. How far is that above this property?

A. About five miles.

Q. You frequently see this property, don't you?

A. Yes, sir.

Q. You were asked with reference to that island up there who formally owned that island? Was it Hipp?

A. Hipp owned it when I knew it.

Q. You were asked this question: Do you know what finally became of this island? (Reads questions and answer from the deposition.) That deposition was taken in 1895?

A. I suppose so.

Q. This ridge is way above Crutcher Lake?

A. I reckon three miles close to the Tennessee shore.

Q. What connection, if any, ever existed between this sand bar and Flower Island?

A. None at all. This sand bar was a mile and a half above Flower Island.

Q. Is that a matter of fact?

A. Yes, sir.

Q. You still stick to that?

A. I'll still stick to that.

Q. Now you were asked this question: "Did a man by the name of Fortner live in one of the houses?" You answered, "Yes." That Fortner house is how far from Crutcher Lake?

A. Near a quarter of a mile from Crutcher Lake.

Q. Isn't the Fortner house just east of or towards the Tennessee shore from Crutcher Lake about a quarter of a mile?

A. It is east of Crutcher Lake.

Q. Isn't the back bone—is not the Fortner house about a quarter of a mile east from the back bone, on the east?

A. Yes, sir.

Q. And that back bone you say never did all wash away?

A. Never since I knew it. Part of it gave way in 1863, or 1864.

Q. And you have known that back bone since '63?

A. I have know it from 1854.

Q. And from 1854 to 1863 that back bone on Crutcher Lake opposite where the Hipp house stood never did wash away when you knew it?

A. I don't know whether you call it opposite or not.

Q. The Hipp house or the back bone?

A. The Hipp house. The Fortner house is right down the back bone on Crutcher Lake and the Tennessee shore.

Q. It is down the island?

A. Down the river.

Q. Down the river?

Q. It is nearly an east and west line from the Fortner house to the back bone.

A. Pretty nearly.

The Court:

Q. What connection did this back bone ever have with Flower Island as you first knew it?

A. I don't know that it ever had any.

Q. Has it any connection with Flower Island as you now know it?

A. Yes, sir.

Q. How close is the back bone to what is now known as Flower Island?

A. About forty or fifty yards from the slough.

Re-Cross-Examination by Judge Heiskell:

Q. Isn't there a slough between the Fortner house and the back bone?

A. Yes, sir.

Q. Doesn't that slough go up above the Fortner house and go in between the back bone and the land that is north of the back bone and isn't there a depression and doesn't it run through the land in there?

A. There is a slough that runs out of Crutcher Lake.

Q. Is that the slough that comes from Crutcher Lake and runs round the back of that back bone and down towards Coal Creek?

A. Yes, sir.

Q. Do you know whether that back bone was any part of the original Flower Island or not?

A. I know it was an island, I don't know whether it was Flower Island or not.

Q. This slough that you are speaking about didn't cut the Fortner house from the ridge?

A. No, it is a different slough.

Q. There is a little slough between the back bone and the Fortner house and it runs north and there is a depression and then after you cross that slough there is a ridge and it runs to the Tennessee shore?

A. Yes, sir.

Q. You say between the Hipp house and the back bone there was another slough?

A. Yes, sir.

Q. That slough dried up, didn't it?

A. Yes, sir.

Q. Have you had occasion recently to examine the timber upon that back bone?

A. Yes, sir.

Q. How long since?

A. Two or three weeks.

Q. What is the size and character of that timber?

A. There are some two or three trees that would measure two and a half or three feet.

Q. Not more than two or three?

A. No, sir. I don't think there is.

Q. Are there many or few of them?

A. Very few.

Q. Are you in the habit of measuring timber?

A. Yes, sir.

Q. You are familiar with that kind of business?

A. Yes, sir.

Re-Examination by Mr. Randolph:

Q. You have talked about the premises, see if you recognize that as a correct representation of the premises? (Hands witness a map.)

Q. I ask him if he recognized that to be a comparatively good description of the premises on that locality?

A. I don't recognize it now.

Re-Cross-Examination by Judge Heiskell:

Q. You stated that the trees on the bank of Crutcher when you were there a few weeks ago were not large?

A. No, sir, not large.

Q. Did you notice one tree that was 16 feet in circumference?

A. No, sir, and I don't think there is one there that large.

Q. If there is one there that large you didn't see it?

A. No, sir, I don't think there is one there that large.

Q. You don't mean to say there is not any there that large but you didn't see it if there is?

A. No, sir, I didn't see any that large.

Alexander Baker, recalled by defendant, Ayers.

Examined by Judge Heiskell:

Q. Are you acquainted with the parties to this law suit?

A. Yes, sir.

Q. Polsdorfer, Ayres, Roy and Price?

A. Yes, sir.

Q. Are you acquainted with what is known as Flower Island?

A. Yes, sir.
Q. How long have you known Flower Island?
A. Since about 1854.
Q. What was the size of Flower Island in 1854?
A. Well, I can't tell you.
Q. You don't know how many acres?
A. No, sir.
Q. Was it large or small?
A. A tolerably large island.
Q. State if there was any farming on it?
A. Yes, sir.
Q. Do you know how many acres were cultivated?
A. No, sir, I do not, but there was a right smart farm land on there.
Q. Who was the owner then?
A. Olridge Hipp.
Q. Old man Hipp?
A. Yes, sir.
Q. Do you know from whom he purchased it?
A. No, sir, I don't.
Q. Do you know a man by the name of Barnes?
A. Yes, sir.
Q. Do you know whether he purchased it from him or not?
A. No, sir, I do not. I knew that they said Barnes used to own it, but I didn't know anything about it then.
Q. Well, have you been on this island frequently since 1854?
A. Yes, sir, more or less.
Q. How often were you on it from 1854 up to 1864?
A. Well, I can't tell you, sir.
Q. How many times a year?
A. I was not on it much from 1854 up to 1861 or 1862.
Q. You didn't live in that country then, but from 1862 on up to what date?
A. Well, in 1863 or 1864, I can't tell you the number of times because I boarded there for two or three weeks at a time.
Q. And you were boarding there in 1864?
A. Yes, sir.
Q. And in 1863?
A. Yes, sir, in 1863, too.
Q. Was there a farm there then?
A. Yes, sir, a small little farm.
Q. Who was living there then?
A. Elijah Stamp.
Q. Do you know who he claimed for?

A. Oh, he just stayed there.

Q. You stated that the island washed away up above the Hipp house about 1855 or 1856; what Hipp place?

The Court: That is, Mr. Baker said that the island at the Hipp place washed away?

A. Yes, sir.

Q. Where was the Hipp place with reference to the back bone on Crutcher Lake?

A. About two or three miles below, towards Ft. Pillow.

Q. Mr. Baker, here is Crutcher Lake on this map; where is that back bone? Here is the Mississippi, and here is the old Tennessee shore, and there is Coal Creek; now where was the Hipp place with reference to Crutcher Lake?

A. The Hipp place would be a little east of there—east of Crutcher Lake.

The Court: Just put AB where you think it is.

Witness: The Hipp place is on the Mississippi River side.

Judge Flippin: That is the present Mississippi?

A. The present Mississippi—yes, sir.

Q. A and B. is the Hipp place?

A. Yes, sir.

Q. Then you go about three miles on to Crutcher Lake?

A. Yes, sir.

Q. Now, is that the Peel and Fletcher grant?

A. Yes, sir. Well, here lies Crutcher Lake at P, and here lies the back bone right at PP.

Q. Now where does Old River run? Is that a correct delineation of Old River?

A. Well, that is a good deal the shape of Old River.

Q. From the Peel and Fletcher entry, then, does it follow after the shape of Old River; does it run up here and join Crutcher Lake?

A. Yes, sir, it runs on here. G shows where Old river joins Crutcher Lake, and Crutcher Lake lays on the same place, and it is right on the bank; then comes in the Howard entry and still Cruther Lake goes on.

Q. From the Fortner house towards the original shore, what is the lay of the land?

A. Well, the land lays from the Fortner house, running in a due north line, the land lays about the same until you get within two or three hundred yards of what you call Old river, and then it slopes, and in Old River there is nothing but willows.

Q. State what is the character of the growth from

the back bone there towards the Tennessee shore, in all directions that is whether the timber grows large or small?

A. Taking it west, the timber grows larger; taking it east of north the timber grows smaller.

Q. From Crutcher Lake down to Coal Creek, is that where the timber grows larger?

A. Yes, sir, running north.

Q. Then, as you go out in this direction (indicating on map), towards this curved line, what is the character of the timber?

A. Well, the character of the timber runs small, and then, further on, a little ridge and cotton wood, and then it runs off into the water.

Q. How about the timber on the bank of Crutcher Lake?

A. Well, it is right small sized timber—cotton wood and maple.

Q. There is oak timber in there, isn't there?

A. I never saw oak on the island.

Q. How about mulberry?

A. Plenty of mulberry.

Q. What sized mulberry trees?

A. Sizes from a man's arm up to seven or eight inches—different sizes.

Q. Seven or eight inches in diameter?

A. Yes.

Q. State what you know, if anything, about some of the land near Crutcher Lake, or back bone, as some speak of it?

A. There is a little, small back bone ridge right at the foot of the lake.

Q. State how long you have known that back bone.

A. Well, since 1863.

Q. Were you not there in 1854?

A. I don't know. I was traveling on the river.

Q. Then you were not on the island in 1854; you didn't know this back bone in 1854? I understood you to say you were there in 1854?

A. Yes, sir, I was on the island.

Q. There is no Arkansas Island, it is all Flower Island?

A. That is the way I understand it now. It has always been called Flower Island.

Q. You said in your deposition taken a few days ago that this back bone is a part of the original island, "and is was there in 1854 when I first knew it." That is a mistake on the part of the man who put it down, is it?

A. I meant in 1863. If I said 1854, I didn't mean it.

Q. Since you have known the island, state whether there is any such thing as a bayou running down east of this high point, down through Coal Creek? Did you ever hear of a slough there that has water in it all the time?

A. Yes, sir; that is, Crutcher Lake drains into what we call Hepright Pocket.

Q. What sort of drain is it?

A. It is all grown up with willows, and breaks out into a lake.

Q. There is no other water there?

A. No, sir—a little water in Hepright Pocket.

Q. If there was at any time a running stream there so far as you know, state when it was.

A. Well, there was a small running stream of water; this was a small stream clean around to Crutcher Lake.

Q. When was that?

A. In 1863.

Q. Then Crutcher Lake at that time extended clear down there?

A. Yes, sir, down to the middle of Coal Creek.

Q. Since then, do you recollect when that ceased to run there at all?

A. No, sir, I don't remember when that shut off.

Q. State when that timber that you say is all over there grew up and how large it is.

A. It is different sizes box timber.

Q. You don't suppose it is 12 inches, do you?

A. Twelve inches—yes, sir.

Q. Has it been closed up long enough for the timber to get twelve inches through?

A. Yes, sir.

Q. If you know where the Woodfolk tract is, state that fact.

A. It lies north of this island, a portion of it. It might be some northeast of this island.

Q. East of the Peel and Fletcher entry?

A. Yes, sir.

Q. Do you recognize the Fletcher entry from the map of the Woodfalk grant?

A. Yes, sir.

Q. The place marked on the map is the Woodfolk tract?

A. Yes, sir.

Q. Why do you know that is correct?

A. Because I once ran the line with the surveyor.

Q. When?

A. When the last surveyor surveyed it.

Q. When was that last time?

A. Well, I ran it with him.

Q. With whom?

A. Jeter.

Q. The man who was examined yesterday?

A. Yes, sir.

Q. That is what you surveyed, I understand you to say?

A. Yes, sir, he was doing the surveying, of course, and I was along with him.

Q. What for?

A. To show him some corners we had located before.

Q. Does it front on Old River now—the front of the Woodfoik tract?

A. I don't know.

Q. Do you know whether that is the old Joe Marley tract of land?

A. It is the tract that Marley bought, and that he claims he owns.

Q. How long have you resided in Lauderdale County?

A. Sixty-two years.

Q. What official position, if any, have you held during that time?

A. Magistrate during some of the time.

Q. During what time, do you recollect?

A. I don't recollect. During the seventies, some time.

Q. What duties did you have to pursue aside from your official duties?

A. Sometimes assessed taxes.

Q. When did you ever assess taxes?

A. During my administration, but I doubt if I can tell you the exact time.

Q. About twelve years—wasn't that in 1872, or along there somewhere?

A. Yes, sir.

Q. What district did you assess? I mean did you ever assess any of the 5000 acres?

A. The 5000 acres—yes, sir.

Q. Well, did you assess that from 1872 to 1885?

A. Yes, sir.

Q. What assessment, if any, had you made on this Flower Island?

A. I never did make any?

The Court: What is the date of your grant, Judge Flippin?

Judge Flippin: My grant is in November, 1891, the Price grant, and there is a later one in 1894, signed by Peter Turney.

Q. If you know anything about Flower Island being a refuge for people accused of misdemeanors in Tennessee, state it.

Question objected to, and objection sustained.

Q. I will put the question again, do you know, and, if so, state whether or not anybody accused in Tennessee of misdemeanors and crimes sought refuge in Flower Island, and if there was, did an officer of Tennessee pursue them?

A. Only one case.

Q. State it.

A. In 1854 I went there to see about a man that run from the officers.

Q. Well, did the officer get him?

A. I don't know. He said it was in Arkansas, and that is why he didn't go.

Q. The officer didn't go for him?

A. No, sir.

Cross-examined by Mr. Randolph:

Q. On that island, as I understand you, you say where the Hipp place was is all gone away?

A. Yes, sir, all of the farm is gone.

Q. Do you know anything about the grove of willows?

A. No, sir, I can't say that I do particularly.

Q. Do willows grow on this land?

A. Yes, sir.

Q. How high and how large?

A. I suppose the willows right there are from 15 to 16 inches; probably a little larger.

Q. As large as willows usually grow?

A. No, sir.

Q. Is there any way by which you can tell the age of a willow?

A. No, sir.

Q. They grow in the water sometimes, don't they?

A. Yes, sir.

Q. In marshy places?

A. Yes, sir.

Q. They grow all about the bottom anywhere there is a little water?

A. Yes, sir.

Q. Did you assess the land on the main shore?

A. Yes, sir.

Q. Who paid the taxes?

A. Mr. Marley.

Q. (Judge Flippin:) Isn't this Woodfolk tract or grant partly in the 4th and partly in the 5th Civil District?

A. I don't know. There may be a part of it in the fourth. We have got half of it assessed, and if it had been a part in the 4th and a part in the 5th—probably there was a part in the fourth.

Q. Only a part assessed in the fourth?

A. I don't know anything about that.

Q. How far was the Hipp house from there?

A. Between two and three miles, right down the river.

Q. Right down the river?

A. Yes, sir.

Q. Is there such a pocket of water as you call the Hep-right pocket there?

A. Yes, sir.

Q. Where does it extend?

A. A right smart way.

Q. Well, how long is it?

A. Possibly a mile long.

Q. Is there water standing in it all the way?

A. I don't know about that.

Q. When did you last see it?

A. Early in the spring.

Q. You mean in 1899, and water was standing there then?

A. Yes, sir.

Witness excused.

Thomas Price, T. A. Roy and E. J. Roy, defendants, then introduced the following testimony:

(1) W. O. Jeter, who testified as follows:

Examination by Judge Flippin:

Q. Your name is W. O. Jeter?

A. Yes, sir.

Q. What is your business?

A. County Surveyor of Lauderdale County.

Q. Surveyor of Lauderdale County?

A. Yes, sir.

Q. Have you made a map of the Price grant and the Roy grant recently?

A. Yes, sir.

Q. Have you it before you?

A. Yes, sir.

Q. Does that correctly state there the relative position of those grants?

A. Yes, sir.

Q. Well, how did you make up that map?

A. I got a description of the lands from the surveyor's book.

Q. Made up from these grants?

A. Yes, sir.

Q. Well, now, I wish you would turn—. Just come out here in front of the jury. Does the Woodfolk grant—where does it commence?

A. There is the Woodfolk grant. (Witness locates on a map the Woodfolk grant.)

Q. Where is it you first commence?

A. Down here.

Q. How does it run?

A. It comes down here and around down here.

Q. Now where is the Roy grant?

A. There is the Roy grant.

Q. Enclosed in the blue marks?

A. Yes, sir.

Q. Where does that commence?

A. Right down here.

Q. That is not in front of the Woodfolk grant at all, is it? It begins on the south boundary of the Woodfolk grant and runs south?

A. No, sir, west.

Q. It is not between the Woodfolk grant and the river at all, is it?

A. No, sir.

Q. You mean the Old River——?

A. I mean the Old River——.

Q. Now, if that land were extended down south the land from here to up here would be out of the Price grant, wouldn't it?

A. Yes, sir.

Q. This is the extreme eastern boundary?

A. Yes, sir, the extreme eastern boundary.

Cross-examination by Mr. Randolph:

Q. (This first question and answer I could not hear.)

Q. Have you made any calculations as to the number of acres embraced within those limitations?

A. No, sir.

Q. Did you make any calculations in the Price grant?

A. No, sir.

Q. How long since you saw this property?

A. I saw it between the 6th of November and the 27th.

Q. This year?

A. Yes, sir.

Q. Well, have you had occasion to frequently go in the neighborhood of this property?

A. No, sir, I never was there but two or three times.

Q. Do you know anything about that Old River?

A. I was told there was an Old River.

Q. Do you know anything more than you were told?

A. No, sir, except these grants call for it.

Q. And that is all you know?

A. I have made a survey of them and the distance didn't measure out exactly correct.

Q. But substantially so?

A. Well, approximately so.

Q. Approximately so?

A. Yes, sir.

Q. In going up the part of the Old River on the Tennessee side did you find any water?

A. There I found water.

Q. Close to the Tennessee shore?

A. Yes, sir.

Q. How much water?

A. A place a mile long, probably more.

Q. That was in one long connected piece of water?

A. Yes, sir.

Q. Did you find any other beside that?

A. Yes, sir, I found a mile of water, I don't know whether that was connected with the other water or not, I think it was.

Q. What size was that?

A. A place the size of the court room.

Q. Did you examine the depth of Old River?

A. I threw a pole in it, and it seemed to be right deep.

Q. How long was that—

A. It would average fifteen or twenty yards wide, some places narrower and some places wider.

Q. How far did this water extend up towards the Roy grant on the Tennessee side going west?

A. I don't remember, I suppose then it was a mile, nearly a mile from where this water began back to the Roy grant west.

Q. How close did it approach the Roy grant, that is the better part of the water?

A. It was about a mile from it.

Q. State what the character of the banks on the Tennessee side.

A. They were well defined banks all along.

Q. State to the jury about the land upon the west side of the Old River, how was that?

A. To the left bank it was a low place, and it was a

gradual slope as the land left the bank it sloped up towards the middle of the island.

Q. It was higher at the upper end of that main land than it was down where it was known as Old River?

A. Yes, sir.

Q. It was higher out south of the Old River bank than it was right at the river?

A. Yes, sir.

Q. Did you notice the timber?

A. I didn't pay any strict attention to it.

Q. What was the character of the timber, the size?

A. It was twenty-four or maybe thirty inches through.

Q. Where is this timber? Was it generally small or generally large size?

A. There was possibly most of the timber tolerably large and I believe the rest was small.

The Court:

Q. Where is this timber of which you speak as being twenty-four or three inches through?

A. It is out on the island on what is called the newly made land there on the Old River.

Q. Is there any timber in what appears to be the Old River bed?

A. No, sir, I don't believe I noticed any timber there.

Q. The banks down the east side of Old River are well defined?

A. Yes, sir, well defined.

Q. Tell the jury where Crutcher Lake is put down on this map.

A. That is Crutcher Lake right here. (Witness locates said lake on a map.)

Q. Commences where?

A. I don't know how far it extends up here, it extends past this land right here, though.

Q. Past the Price grant?

A. Yes, sir.

Q. Extends down to this land and a little farther east than the eastern line of the Woodfolk grant?

A. Yes, sir.

Q. Do you know anything about the Old River bed along up here?

A. I have been along here and it looks like an old bank.

Q. Looks like an old bank?

A. Yes, sir. Yes, sir.

(Mr. Randolph continues.)

Q. When did you first see these premises?
A. You mean the Woodfolk grant?
Q. Yes.
A. It was the 7th day of November we went to make a survey of the land.
Q. This year?
A. Yes, sir.
Q. You had seen them before, though?
A. Yes, sir, last January.
Q. Hadn't you seen them before?
A. Not to know that it was them, no, sir.
Q. Didn't you make that map?
A. Yes, sir.
Q. Didn't go to the ground when you made it?
A. No, sir, I don't think I did.
Q. Didn't you go on Flower Island and into Fortner's house and make that map down there?
A. I don't remember where I made the map.
Q. Didn't Price pay you for surveying that land?
A. Yes, sir, I went over there and started to making a survey of that land last July.
Q. Look at the date on that paper.
A. May 27th.
Q. That is correct, is it not?
A. I suppose it is.
Q. What did you do at that time on that land?
A. I don't think it was in May, it was in July, I think.
Q. Did you go there?
A. Yes, sir, and started to make a survey of something and the water was so high or something.
Q. Is it not a fact that was the first time you ever saw the land?
A. No, sir; I was there in 1896 or 7.
Q. Then that was the first time you ever saw the land?
A. Yes, sir.
Q. You first saw the land in 1896 or 7?
A. Yes, sir.
Q. What did you make this from (hands witness paper)?
A. I don't know whether I got it out of R— or the book, both probably.
Q. These names and figures, that you put on here were made from a book and not by the actual surveys or looking at the land?
A. No, sir; they were made from the calls in the book.
Q. You first saw them in May, 1897, then in July, 1898?
A. I don't remember distinctly. I went there and run a line for somebody and when I went to make a survey

for Price, Polsdorfer said it was his land and when I did make a survey for Price I found that it wasn't his land.

Q. Well, did you make a survey for Polsdorfer?

A. Yes, sir.

Q. Where is it?

A. At home.

Q. Is this a copy you furnished me with?

A. No, sir.

Q. You made another?

A. No, sir; I made a rough sketch of it. I didn't make the one I expected to give to him.

Re-cross examination by Judge Flippin:

Q. These distances you put down here are correct?

A. Yes, sir; approximately correct.

Q. Approximately correct?

A. Yes, sir.

Q. Now, this place you call the bank of Old River?

A. Well, these lands are called for Old River—

Q. The measurements of the land were approximately accurate?

A. Yes, sir.

Q. That country is growing up in timber?

A. Yes, sir.

Q. There is a part there has been cleared off? You say there is some water around in here?

A. No, sir; this water is joined together for a good, long distance.

Q. You saw it just after the last overflow?

A. Yes, sir.

Q. Isn't that just a depression in which this water rests, that is it was not running through there? Has it no outlet?

A. Yes, sir; there is a low place that extends down to the creek, I believe.

Q. Just a little lower than the ground?

A. Yes, sir.

Q. It wasn't running through?

A. Yes, sir, there was water in what was called the river.

Q. It might be just a wet weather stream?

A. I don't know anything to the contrary.

Q. You don't know anything to the contrary?

A. No, sir.

Q. You have got a plat of the survey you say you made for Polsdofer? You say you have it here?

A. No, sir. I could give you the figures but that would be no information for you.

Q. Did you see the house on the main land known as the Fortner house?

A. Yes, sir; I saw the house and a man by the name of John Bell was living there, and somebody told me it was the Fortner house.

Q. Whereabouts is that on your plat here? Did you mark it on the plat?

A. No, sir; I didn't put it on the plat.

Q. Indicate it on the map by writing the word Fortner. I notice you have written on that about 2 1-16 by the old survey. Do you mean by the present land of the river now and the old bank? Those your figures 2 1-16 down here cross this plat? Are they measured with the same scale the map is made on? What is the distance from the Fortner house direct out to the Mississippi river?

A. It is just about a mile, I reckon.

Q. Just about a mile?

A. Yes, sir.

Q. Now, running it direct from this corner—now, there is a corner right there. That is the corner of the Woodfolk grant?

A. No, sir. That is the Woodfolk grant.

Q. Now, how far is the present river from that corner of the Woodfolk grant?

A. I don't know, sir.

Q. You didn't measure it?

A. This direction that house is about a mile.

Q. You didn't measure it but you think it is about a mile?

A. Yes, sir.

Q. Do you see any great difference between the timber on that island?

A. Yes, sir. Some places that I noticed the timber was small, all of it.

Q. What part was it largest on?

A. It was on the part—I believe—I think right along the southeastern part. The small timber was all along this land and there was some timber along this lake that was tolerably large.

Q. You noticed the large timber down this way? Did you notice the timber about Crutcher Lake?

A. Yes, sir; I noticed the timber three or four years ago in 1896 or 7.

Q. What was the character of the timber then?

A. Not very large, about twenty-five or thirty inches.

Q. Are you the county surveyor of Lauderdale county?

A. Yes, sir.

Cross-examination by Judge Heiskell:

Q. Did you observe the timber at Crutcher Lake particularly?

A. No, sir; I didn't take any careful notice of it.

Q. The timber there is generally not very large?

A. I didn't notice any large timber.

Q. There could have been large timber there and you not have seen it?

A. I suppose so.

Q. Isn't there a back bone right there at Crutcher Lake towards the Arkansas shore from the Fortner house?

A. A man showed me a sort of high place there.

Q. Do you recollect there is a sort of slough between the Fortner house and the back bone?

A. I don't remember where the back bone was. We were going through there and he showed me a place that was higher but I don't remember how far it was from the Fortner house.

Q. That timber thins out from the Fortner house going towards the Tennessee shore?

A. North from the John Bell house to the Tennessee not over a quarter of a mile or a little over.

Q. You mean right towards the Tennessee shore?

A. Right towards the Tennessee shore.

Q. How far is it from the Fortner house across to the Mississippi river as it now runs?

A. I didn't measure it but about a mile, I think. Something like a mile in a northwestern direction.

Q. What was the character of the timber as you approach the Tennessee shore from the Fortner house?

A. I didn't pay much attention to the timber. I think north of Crutcher Lake, I think the timber that was north of the lake was a little larger than the timber south of the lake.

Q. But you don't know whether it is larger or smaller towards the Tennessee shore?

A. No, sir; I couldn't tell you the character of the timber.

Q. Did you notice from Crutcher Lake going towards the Arkansas shore? In running this line through did you notice it?

A. Yes, sir; I noticed the timber along there and the comparative size from the lake towards the river and it gets smaller as we approach the river.

Q. Going up Old River you say you found places a mile long from fifteen to twenty yards wide, one solid sheet of water?

A. Yes, sir; I think one place the water was connected for about a mile and averaged from forty-five to sixty feet wide.

Q. What was the character of the timber?

A. It was a growth of willow timber and looked like old timber.

Q. And very small?

A. No, sir right good size.

Q. You noticed when you crossed that pond of water going towards the Tennessee shore that there was quite a bluff or bank there?

A. Yes, sir; a well defined bank.

Q. All the way from the mouth of Coal Creek up to what you were told was Old River?

A. Yes, sir; I think I noticed the old bank all the way along.

Q. Up to the Polsdofer 5000 acres?

A. What is it?

Q. Did you notice whether or not the old bank and this mile of water passed his 5000 acres, was there a well defined bank all along his 5000 acres?

A. Yes, sir; all the way down to where his 5000 acres turned east.

Q. A well defined bank as I understand you was right along this pond of water?

A. Yes, sir; tolerably close along

The Court:

Q. Did these Woodfolk lines run any where beyond the Old River bank?

(Mr. Randolph):

Q. Didn't you survey the Woodfolk grants all the way through?

A. Yes, sir.

Q. Did the lands go beyond the Old River banks?

A. I didn't get the distances to the Old River bank.

Q. You mean the lines called for in the deed?

A. The distances measured short.

Q. You say in running this Woodfolk line it would have run beyond the bank in distances?

A. Yes, sir; for instance, one line that called for forty-five poles and measured thirty-eight.

Q. You stopped at the old bank?

A. Yes, sir; then there was 6000 odd acres.

Q. The call for the old bank?

A. Yes, sir.

Q. You stopped for the call, then you hadn't got the distances? And that then there was 6000 odd acres?

A. Yes, sir.

(Judge Heiskell):

Q. I understand you to say that you can not state whether or not the timber from this body of water called Old River, whether it grew larger and larger or not?

A. Yes, sir; I noticed that it was larger.

(Mr. Randolph):

Q. You noticed that close to this old bank it was a little smaller as it was in and the timber was larger there as it was near the old bank?

A. In what part of the entry? There was a road that run—

(Judge Flippin):

Q. Do you know anything about the newly made land attached to the Tennessee north and west of the Roy grant?

A. I have passed along that road once or twice.

Q. Do you know anything about the extent of it?

A. No, sir; I noticed land out there and a man pointed out a place called Yankee Bar.

Q. That is hitched on the Tennessee shore now, is it not?

A. I don't know.

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2. Thomas Price, one of the defendants, testified as follows:

Examination by Judge Flippin:

Q. This is Mr. Price? What is your name?
A. Thomas Price.
Q. Are you one of the defendants in this law suit?
A. Yes, sir.
Q. What is your age?
A. Seventy-one years old. Talk a little louder please.
Q. Where do you live?
A. In Tennessee.
Q. In what county?
A. In Lauderdale county.

Q. How long have you been living there?

A. Ever since 1868.

Q. How far do you live from this land in controversy?

A. Two miles from Ft. Pillow.

Q. Two miles from Ft. Pillow?

A. Yes, sir.

Q. Below this land on the river?

A. It is four miles from Fulton and two miles from Ft. Pillow.

Q. When did you first know this land?

A. When I first moved there.

Q. You mean in 1868?

A. Yes, sir; I come there the first of the year.

Q. Do you know anything about what is called the old island when you went there?

A. No, sir.

Q. Was there any island there?

A. I couldn't tell it. There was a low growth there.

Q. Was that on the lower or higher part of the island?

A. The biggest timber was about a mile from the mouth of the creek.

Q. What direction from the mouth of the creek, up the river?

A. Yes, sir.

Q. Old River you mean to say up towards Crutcher Lake?

A. Yes, sir.

Q. What did you know about Crutcher Lake?

A. When I first come to this country this lake extended all the way from the K— place, all the way to the mouth of Coal Creek. It was very low and little bushes had growed up in it and since that it has filled up a little.

Q. You don't know what caused Crutcher Lake do you?

A. No, sir; I don't know that I do, it filled in from what I see from Crutcher Lake to the Tennessee shore.

Q. And that was in 1868 that you first knew about his property and this lake, was it?

A. Yes, sir.

Q. Each of them on the side—

A. No, sir; to the river. It has been made since I have been here.

Q. You mean the Mississippi river?

A. Yes, sir.

Q. That made each fill in below in between Yankee Bar and Crutcher Lake? How long since you saw this property?

A. Well, I haven't been over there in two or three years.

Q. Years?

A. Yes, sir.

Q. Now, state what was the character of the timber in 1868?

A. Well, I told you where the best timber was, right along on the lower end of Crutcher Lake and below this place where I speak of those bushes growed, it was a mile I suppose, it was some five or six hundred acres of timber.

Q. In 1868 what was the size of that land? How many acres?

A. About 1000 acres.

Q. Well, you can state to the court and jury whether that was from all appearances recently made land or not? That is comparatively recently made?

A. Well, it had all young growth on it.

Q. At that time, in 1868?

A. Yes, sir; and there was timber over there then I expect measured from sixteen to eighteen inches and was three feet from the ground.

Q. Well, what did you know about any water down on the Tennessee side? Do you know anything about that? Had your attention been called to it?

A. Yes, sir; and I used to take men along there and all the land was cleared land within one hundred or two hundred yards of Crutcher Lake.

Q. The Old River was well defined at that time?

A. Yes, sir.

Q. From Crutcher Lake to Coal Creek how is it, low?

A. Yes, sir; there was a low place there until you got to Crutcher Lake.

Q. Is it well defined now or not?

A. Well, it is tolerably low now.

Q. Any water in it?

A. At a very dry time any one could ride across on it at the lower end.

Q. Well, what is the character of the timber in Old River over towards the Tennessee shore in size?

A. What, you mean on the main land?

Q. Yes, sir.

A. It is small.

Q. How does the timber on this high land compare with the timber on the Tennessee shore? The kind of timber?

A. The timber on the Tennessee shore is hickory.

Q. Is hickory, and on this land?

A. There are cottonwood trees on this made land.

Q. Are they larger or smaller than on the Tennessee shore?

A. On the Tennessee shore where it has been off it is very large.

Q. Any one acquainted with the cottonwood could tell a young one from an old one?

A. Yes, sir.

Q. How?

A. Well, on a young cottonwood tree the bark is smooth.

Q. Well, does the cottonwood grow rapidly or otherwise?

A. Rapidly, where it has room.

Q. Does its size depend upon its location as to soil and moisture?

A. Oh, yes, sir.

Cross-examination by Mr. Randolph:

Q. Cottonwood grows much larger in some places than it does in others, doesn't it, Mr. Price?

A. Well, in moist ground it grows faster than it does on a high place.

Q. Did you sign that paper (hands witness paper to identify)?

A. Yes, sir.

Q. You know what it is, don't you?

A. Which?

Q. You know that it is an agreement between you and Mr. Marley?

A. What?

Q. You know what it is now?

A. I signed it, but I don't recollect about it.

Q. Well, do you know it?

A. Yes, that is my handwriting.

Q. When you went there in 1868 there was about 1000 acres of this land, you say, in front of Old River?

A. I can't get the hang of it? Speak louder, please.

Q. I say, when you first went there in 1868 there was about 1000 acres of this land in front of Old River? Is that right?

A. A 1000 acres of land made in there.

Q. How much in there now?

A. It is owing to how far west you go of the river.

Q. How far does it go?

A. About Plum Point.

Q. How much since?

A. Plum Point.

Q. Up to the end of the Fletcher tract, how much?

A. My grant calls for 2,150 acres. (I could not hear the rest of this answer.)

Q. The Fletcher Peale grant?

A. I went to the Fletcher grant.

Q. I am not talking about that.

A. I don't know what you call the Fletcher grant.

Q. Do you know the R. Kelm land?

A. Yes, sir.

Q. Well, does it go up as far as that?

A. My grant goes up to that.

Q. How much has been made in there since you went there?

A. 2,150 acres.

Q. I am not taking in that 1,000?

A. Please talk a little louder.

Q. How much more land besides what you got in your grant has been made there since you went there?

A. I got 2,150 in my grant.

Q. How much more is there in there in front of this Woodfolk grant?

A. Well, that I don't think would strike the Woodfolk grant.

Q. How much is there made in front of the Woodfolk grant?

A. You mean—

Q. I mean since you went there?

A. Since I went there?

Q. Yes.

A. Six or seven hundred acres, I am just guessing at it.

Q. Well, you have seen it, haven't you?

A. Yes, sir.

Q. How was that made?

A. It was made by Yankee Bar.

Q. It made by going out into the river, the Mississippi river, didn't it? And pushing the river back with a slough that come into the lake. Didn't it make from the bank out into the river?

A. It first makes out in the river and it keeps getting larger and larger.

Q. Hasn't this 1000 in the river been made since?

A. What?

Q. This addition that has been made to the grant since you went there, has been made out into the river, has it not?

A. I don't get the hang of it.

Q. It has made out in the river hasn't it?

A. Crutcher Lake, well, this land is made in there and here.

Q. Well, that is what I am asking you. Didn't it push the river back?

A. Sir?

Q. It pushed the river out as it came down, didn't it?

A. Yes, sir. Yes, sir.

Q. Well, that is what I am trying to get you to say. This land was made out into the river?

Cross-Examination by Judge Heiskell:

Q. This made land, didn't it commence at Crutcher Lake and go towards the Arkansas shore?

A. It commenced here and made out that way and then next filled out in here and went both ways.

The Court:

Q. Did the continuation of Crutcher Lake the slough run through that land?

A. The sand bar formed out here and that made a slough out there.

Q. There was a sand bar and it made both ways?

A. In the river, and the made land made both ways.

(Judge Heiskell continues:)

Q. Mr. Price where is the largest timber on that island?

A. About a mile below Crutcher Lake where the water is a mile down the river I call it about two miles the oldest timber is found.

Q. Now on the bank of Crutcher Lake isn't there a few very large trees?

A. I haven't seen them.

Q. You haven't noticed any large trees?

A. Yes, sir, I have been down there many a time above where the water is and that ridge and the timber all looks like young timber.

Q. Right at the foot of Crutcher Lake, within a hundred feet of Crutcher Lake, did you notice a cottonwood tree, a very large one sixteen feet or more in circumference?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You didn't say there was no such tree?

A. There is no such tree on the island. I have duck hunted over there and I never saw a tree like that. You mean sixteen feet around? How high?

Q. Three feet from the ground?

A. No, sir.

Q. Did I understand you to say that you were there recently?

A. I was trying to make a calculation.

Q. Did I understand you to say you were duck hunting?

A. Yes, sir, when I was young I went duck hunting over there.

Q. You duck hunted in Old River?

A. Yes, sir, that was a great place for duck hunting.

Q. How recently?

A. About eight or ten years ago.

Q. It was a well defined body of water up from Coal Creek how far? Most of the way to Crutcher Lake?

A. Well, that would be a distance of three or four mile.

Q. Now, on the Tennessee side of the Old River what is the character of the bank?

A. Tolerably steep.

Q. How high?

A. It would average six feet.

Q. In some places as much as ten or twelve feet?

A. It might be.

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(3) Grants from the State of Tennessee.

The State of Tennessee. No. 16936.

To all to whom these presents shall come—Greeting:

Know ye, that for and in consideration of the sum of the fees of office, paid into the office of the entry taker of Lauderdale County, and entered on the 20th day of October, 1891, pursuant to the acts of the General Assembly of said state, passed 2d day of November, 1847, by No. There is granted by the state of Tennessee, unto Thomas Price a certain tract or parcel of land, containing 2150 acres, by survey, bearing date the 20th day of October, 1891, lying in said county. Beginning at a cotton wood tree on the north bank of the Crutcher Lake, the S. E. corner of an entry for 2650 acres granted to M. M. Howard, now owned by Glass & Butler, runs thence south across Crutcher Lake 25 poles to the south edge of said lake to a willow, with cottonwood and willow pns.; thence south 30 degrees west, (magnetic variation being N. 5 1-2 degrees E.) 43 poles to the edge of the Heptright Slough, in all 150 poles to a stake in a sand bar, then south 42 degrees east 810 poles to a stake at low water mark of the Mississippi river, and at the mouth of Coal Creek; then north about 70 degrees east up said creek's

center 150 poles to the mouth of Forked Lake Slough; then up said slough about N. 50 degrees E. 60 poles to a broken top willow; then N. 40 degrees E. 32 poles to a willow; then N. 30 degrees E. 124 poles to a willow with willow pr. on the west edge of said slough; then N. 20 degrees E. 82 poles to a willow with 3 willows, in the west edge of a pond; then North 5 degrees E. 60 poles to 3 willows with willow prs. in the edge of Forked Lake; then North 11 poles to a large cottonwood, with willow and cottonwood prs.; then north 10 degrees west 50 poles to a small cypress with willow pointers; then north 45 degrees west 128 poles to a small ash, cottonwood pr.; then north 53 degrees west 94 poles to a willow with cottonwood pointers; then north 80 degrees west 45 poles to a small ash with 2 hackberry pointers; then north 55 degrees west 28 poles to a cottonwood, with 2 cottonwood prs.; then north 73 degrees west 168 poles to a double maple with cottonwood and willow prs.; then north 85 degrees west 70 poles to a small maple with maple and cottonwood prs.; then south 82 1-2 degrees west 31 poles to a small crooked maple with ash and maple pointers; then south 35 degrees west 16 poles to a maple, with maple pointers; then south 17 degrees west 54 poles to a stake at the north edge of the Crutcher Lake; then north about 50 degrees west, along the north edge of Crutcher Lake 300 poles to the beginning.

Exhibit "A" to Price's deposition.

With the Hereditaments and Appurtenances.

To have and to hold the said tract or parcel of land, with its appurtenances, to the said Thomas Price and his heirs forever.

In witness whereof, Jno. P. Buchanan, governor of the State of Tennessee, hath hereunto set his hand and caused the great seal of the state to be affixed, at Nashville, on the 7th day of November in the year of our Lord one thousand eight hundred and 91 and of the independence of the United States, 116th.

By the Governor, John P. Buchanan.

C. A. Miller.

Secretary of State.

State of Tennessee, Lauderdale County.

I, John E. Walker, register of said county, certify that the foregoing instrument, all properly probated was pre-

sented for registration on the 23 day of Jan., 1894, at 11:10 o'clock a. m. and is so noted in my office in note book 4 page 170 and the same is duly registered in book D. D., page 370 and 1.

Witness my hand at office in Ripley, this 23 day of Jan., 1894.

Jno. E. Walker, Register,
By W. P. Walker, D. R.

Endorsed: No. 16936. Lauderdale County. Book D. D., page 370-1. Registered in Grant Book No. 9. (New Series) page 701, on the 9th, Nov., 1891.

Jno. W. Gates,
Reg. Land Office for West. Tenn.

I certify that Thomas Price is entitled to this grant. Oct. 31st, 1891.

J. W. Gates,
Reg. Land Office for West. Tenn.

The State of Tennessee: No. 17,044.

To all to whom these presents shall come—Greeting:

Know ye that for and in consideration of the sum of the fees of office, paid into the office of the entry-taker of Lauderdale County, and entered on the 1st day of July, 1894, pursuant to the provisions of an act of the General Assembly of said state, passed 2d day of November, 1847, by No. 119, there is granted by the said State of Tennessee, unto T. A. and E. J. Roy a certain tract or parcel of land containing 54 acres by survey bearing date the 4th day of July, 1894, being in said county, in the 5th Civil District, in the Mississippi river bottom, above Fort Pillow and North of Cole creek: Beginning at a small maple, with maple and cottonwood pointers a corner of an entry made in the name of Thomas Price for 2150 acres; then north 4 1-2 degrees west 8 poles to a stake, with hackberry and 2 cottonwood pointers in the south boundary of a 5000 acre entry in the name of W. W. Woodfolk and now owned by J. H. Polsdorfer; thence west with the south boundary of said Polsdorfer and the Peale and Fletcher 400 acre entry 1235 poles to a stake in the east boundary line of now claimed by L. A. Morris, with 3 maples, boxelder and elm pointers; thence south 4 1-2 degrees east with said Morris' line 65 3-5 poles to his S. E. corner on the north bank of Crutcher Lake, an

elm with pecan, elm and mulberry pointers; thence down said lake, with its meanders to a stake on the north bank with double cottonwood prs., the same being a corner of said Thos. Price's 2150 acre entry; thence with said Price's west boundary, as follows: N. 17 degrees E. 54 poles to a maple with maple prs.; thence N. 35 degrees E. 16 poles to a small crooked maple with ash and maple prs.; then north 66 degrees E. 40 poles to the beginning. With the hereditaments and appurtenances.

To have and to hold the said tract or parcel of land with its appurtenances to the said T. A. and E. J. Roy and their heirs forever.

In witness whereof P. Turney, governor of the State of Tennessee, hath hereunto set his hand and caused the great seal of the state of be affixed, at Nashville, on the 18 day of September in the year of our Lord one thousand eight hundred and 94 and of the independence of the United States the one hundred and 18.

P. Turney.

By the Governor,
Wm. S. Morgan,
Secretary of State.

State of Tennessee, Lauderdale County.

I, John E. Walker, register of said county, certify that the foregoing instrument, all properly probated was presented for registration on the 24 day of Nov., 1894, at 4 1-4 o'clock p. m. and is so noted in my office in note book 4, page 178, and the same is duly registered in book "E. E." pages 222 and 223.

Witness my hand, at office in Ripley, this 26 day of Nov., 1894.

Jno. E. Walker, Register,
By Wm. P. Walker, D. R.

Endorsed: No. 17,044. 54 acres, Lauderdale County, Book "E. E.", pages 222 and 223.

Wm. P. Walker, Dept. Reg.

I certify that T. A. and E. J. Roy are entitled to this grant.

J. W. Gates,
Reg. Land Office for West. Tenn.

(4) Plaintiff then introduced and read the deposition of John P. Laney.

The deposition of John P. Laney, taken before Thos. R. B. Lawrence, a notary public, at Price, Tenn., on be-

half of the complainants, upon the interrogatories following, all formal matters being waived.

Q. 1. State your age and residence and occupation, and whether you are acquainted with the parties to this suit?

A. To the 1st interrogatory I am 66 years of age, my residence is near Fort Pillow, Lauderdale Co., Tennessee, I am a farmer. I am not acquainted with the plaintiffs and have seen the defendant one time.

Q. 2. How far is your residence from Fort Pillow, Tenn, and how long have you resided there or in that vicinity?

A. I say my residence is about 3 miles from Fort Pillow, Tenn., and have resided in this neighborhood for the last fifty years.

Q. 3. Did you ever know an island in the Mississippi river near the present site of Fort Pillow, known as Flour Island? If yes state when you first knew it and how long you knew it?

A. Yes. I first knew it about 50 years ago, and knew it up to 1863 or 1864.

Q. 4. Is that island still existing, if not please state what became of it. If you shall say that this island once existed, and then disappeared, please state when it disappeared and how it happened?

A. The island is not in existence. The island commenced washing away a short time previous to year 1860 and finally disappeared in the year 1863 or 1864. I do not remember which.

Q. 5. Please state what opportunities you had for knowing the facts, to which you testify?

A. I obtained the knowledge of the facts of the disappearance of the island by personal knowledge when I was hunting there or chopped wood on the island.

Q. 6. Do you know anything of a certain body of land in the vicinity of Fort Pillow, or Coal Creek from which Hunter & Frey cut and removed certain willow brush in September, 1893. If so please state where that land is. State whether it is in Tennessee or in Arkansas, and whether it ever was in Arkansas. If you shall state that the land from which these willows were so cut is on the Tennessee side of the river, please state whether it is new land and whether it was formed upon any other land, and if so whether the land, from which it was formed is in Tennessee, or Arkansas?

Q. 7. Please state what means of information you have as to the matters referred to in the last interrogatory?

A. I have no personal knowledge where Hunter & Frey cut brush in September, 1893.

Cross-Examination waived with privilege to cross-examine when deposition returns.

Dec. 17th, 1894. C. W. Heiskell.

I do solemnly swear that the above answers to the foregoing interrogatories are true to the best of my knowledge and belief. So help me God.

John P. Laney.

The foregoing deposition was taken before me as stated in the caption and reduced to writing by me. And I certify that I am not interested in this cause, nor of kin or counsel to either of the parties, and that I sealed them up and deposited them in the post office at Price, Tenn., addressed to Smith & Trezevant, without being out of my possession or altered after they were taken.

Given under my hand and notarial seal this 24th day of December, 1894.

(Seal.) Thos. R. B. Lawrence, Notary Public.

(5) Also the deposition of L. A. Drouillard.

The deposition of Capt. L. A. Drouillard, taken by consent at the office of Smith and Trezevant, No. 2 Madison St., Memphis, Tenn., before F. M. Guthrie, a notary public, to be read on behalf of the plaintiffs in this case.

The said L. A. Drouillard, being first duly sworn deposes and says as follows:

Q. 1. Please state your name, residence and occupation?

A. L. A. Drouillard, Memphis, Pilot on Mississippi river between St. Louis and New Orleans.

Q. 2. How old are you Captain?

A. I will be 68 the 12th day of October.

Q. 3. How long have been a pilot on the Mississippi river?

A. Well, I know I commenced in 1844.

Q. 4. Had you any previous experience on the river before you began to pilot and how long?

A. I was three years running the river, and two years learning it before I began to pilot. I was three running before I began to pilot and two of those three years I was learning the river.

Q. 5. During the two years that you were learning the river were you up and down the river often or otherwise?

A. As often as the boat would make a trip; which was about every 18 days.

Q. 6. During that early part of your experinece on the river did you become acquainted with the place called Flour Island. If so please state when you first recollect having seen that Island and where it was located?

A. Yes, I did become acquainted with Flour Island. In 1842 and 1843 I first remember to have seen it. It was near Fort Pillow.

Q. 7. How long did you know this Flour Island after you first became acquainted with it?

A. I think it disappeared in 1843 or 1844.

Q. 8. How did it disappear?

A. The channel changing from the left to right, from east to west cut it away or caved it away.

Q. 9. Was it caved entirely away or only partially, and was there anything left of it?

A. Yes, it was caved entirely away and there was nothing left away I know that I remember that more than anything else.

Q. 10. What is it that makes you so certain of it?

A. My attention was drawn to the rapid caving of the timber and the channel shifting from east to west and until it entirely disappeared.

Q. 11. Was it any part of your business to notice things of that sort?

A. That was my study.

Q. 12. What is the extent of a pilot's duty in regard to watching things of that sort?

A. Why I don't know how to answer that exactly. It is just like anything. It is his business to keep up with everything so that he may know how to run day and night and during all kinds of weather. It is a constant study. I am still learning yet.

Q. 13. I show you now a map exhibited with the deposition of Capt. Marsh Miller in this case, purporting to show the location of Flour Island and the channel of the Mississippi in 1839. I ask you to examine it and then state whether or not the Flour Island that you knew in 1842 and 1843 is properly located on that map. (Counsel hands witness map referred to.)

A. As it appears there, is just as it appeared to me when I first saw it. I would consider that a pretty good representation of it.

Q. 14. I notice the figure 33 written on the spot marked "Flour Island." What does that mean?

A. It was the number of the island. It was then known as Island No. 33.

Q. 15. How was the channel of the river at the time you first knew that spot along in 1842 or 1843?

A. It was to the east of the island.

Q. 16. Now, when the change occurred that you speak of, where did the channel go?

A. To the left, towards the Arkansas side.

Q. 17. Where is the channel at the present time?

A. The banks have caved and there have been a great many changes, but the general course of the channel—this Flour Island may have extended away up to about where this timber was cut, but the general course of the channel is about the same as it was then.

Q. 18. What is about the character of the water opposite Fort Pillow, and along the spot where Flour Island is now marked on the map of 1839?

A. Instead of the island there, it is a bar there, making out from Craighead's point. There is no inside way now, but there was at that time.

Q. 19. Do you know anything of some new made land above and near Fort Pillow upon which there is a growth of willows?

A. Yes, that has all be new made since that time.

Q. 20. Well, was that land made from the Tennessee side or the Arkansas side?

A. The Tennessee side.

Q. 21. Have you observed it much or little?

A. I have observed it as much as I would in my business. That is my business to observe.

Q. 22. Did this new made land begin to grow before or after Flour Island washed away?

A. Of course it was after Flour Island went away. It always does. Like it does here.

Defendant's counsel objects to the whole deposition as irrelevant and incompetent, and not waiving his said objections, proceeds to cross-examine as follows:

Q. 1. How large was Flour Island when you first knew it?

A. Well, there was large timber on it. I couldn't tell exactly how large it was. It was large enough to make snags.

Q. 2. Well, I mean how many acres in the body?

A. I couldn't tell the number of acres, but it was not very large.

Q. 3. How far was the nearest point from Flour Island to Fort Pillow when you first knew it?

A. The river at that point was a 1-4 of a mile or more. I couldn't say. The main channel of the river was there when I first saw it.

Q. 4. How wide was the channel of the river from

Flour Island to the Arkansas shore at that time?

A. It wasn't near so wide, until it was cut away. When I first knew it the channel between the Arkansas shore and Flour Island was very shallow.

Q. 5. Now, Capt., can you give the distance between Fort Pillow and the head of Flour Island when you first knew it?

A. I couldn't guess at the distance of it.

Q. 6. Nor from the southern point?

A. No, sir. What I know distinctly is, that when the channel changed from east to west the island disappeared.

Q. 7. How far does the made land now extend from the Arkansas shore Craighead's point into the Mississippi towards where Flour Island was when you first knew it?

A. It extends over to where Flour Island was, when I knew Flour Island.

Q. 8. Capt. that made land from the Arkansas shore has been making ever since the disappearance of Flour Island?

A. The bar from the Arkansas shore extends over two-thirds across the river to the Tennessee Shore, more or less. I can't say that it extends over all of where Flour Island was, but it does over part of it. Now, Judge, when you are asking these questions, I can't tell anything positive about the details. I know that when the channel changed from east to west, but I can't tell anything about the distances.

Q. 9. After Flour Island disappeared, isn't it a fact that the land appeared above the surface of the river somewhere to supply its place?

A. It appeared above, opposite to where the island was.

Q. 10. On the Arkansas side?

A. No, on the Tennessee side.

Q. 11. Well, now, didn't I understand you to say that the land on the Arkansas shore gradually extended out to where Flour Island was?

A. Yes, that is a fact; that is the nature of it.

Q. 12. How far does the made land extend out from the Tennessee shore towards the Arkansas shore?

A. Oh, I don't know. I couldn't tell you anything about it. I know it was made out there.

Q. 13. Where was the mouth of Coal Creek when you first knew it?

A. I didn't know anything at all about it. I didn't notice then, particularly. It is about the head of the bluff now and just above Fort Pillow landing.

Q. 14. Is there not an old channel of the Mississippi river running up from where Coal Creek is marked on the Miller map, way up to the Fortner house?

A. No, I don't know that. It was there once. The main shore indicates that it was.

Q. 15. Can you tell when this new made land from Plum Point to the mouth of Coal Creek was made?

A. It has been made gradually sometime back. I don't know how long. It has been a long time making.

Re-Examination.

Q. 1. If this new made land on the Tennessee side above Fort Pillow is called "Flour Island," will you state whether that is correct or not?

A. It is no part of Flour Island, no. I am positive of this, because I know that the original Flour Island was washed away long ago.

Q. 2. Has any of this new made land on the Tennessee side ever had any connection with any part of the Arkansas shore?

A. No.

Q. 3. When did the bluff at the mouth of Coal Creek get its name as Fort Pillow, if you know?

A. It was named after Gen. Pillow during the war.

Q. 4. Do you know what the name of that bluff was, when you first knew the river in 1842 and 1843?

A. I do not know. I do not recollect the name.

Q. 5. Wasn't it one of the Chickasaw Bluffs?

A. Yes, I believe it was.

Re-cross Examination.

Q. 1. Is not the made land that you speak of in re-examination called "Flour Island," and hasn't it always been called that?

A. I never knew of it until here lately. It has been called Flour Island since this new survey. Since the war the government has been surveying the river from one end to the other, and they call it Flour Island.

Q. 2. Now, Capt., do you not know that people up there, both on the Tennessee side and Arkansas shore, call it Flour Island?

A. No, I don't know that.

Q. 3. You don't know how that is?

A. No.

Q. 4. How near to the Tennessee shore along in the forties was the steamboat channel of the river?

A. Oh, I couldn't make no answer to that. The chan-

nel always strikes the shore somewhere or other. Well, I can't tell the distance. I know it hadn't yet caved to the bluff. I can't tell the distance, because I don't know. I can't tell how far it was caving in there, but it has been caving in there considerably on the Tennessee shore opposite Flour Island since the Island disappeared.

Re-Examination.

Q. 1. But you do know, you say, that the new made land now called Flour Island has no connection with the original Flour Island, which you first knew in 1842 and 1843?

A. That's right.

Re-cross Examination.

Q. 1. Now, how do you know this, Capt.?

A. I know it from the fact that the channel changed from east to west, and the whole of the island disappeared. That's one thing I do know sure.

And further this deponent saith not.

L. A. Drouillard.

Subscribed and sworn to before me this the 28th day of Sept., 1894.

(Seal.) F. M. Guthrie, Notary Public.

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(6) Defendant Price then read the deposition of James Stewart.

The deposition of James Stewart, taken by consent on behalf of the plaintiffs, at the office of Hunter & Frey, No. 3 Monroe Street, in the city of Memphis, Tenn.

Present for complainant, M. B. Trezevant and C. W. Heiskell for defendant.

The said James Stewart, being first duly sworn, deposes and says as follows:

Q. 1. Mr. Stewart, please state how old you are, where you live.

A. I will be 70 years next October, 1896. I live in Memphis, Tenn.

Q. 2. How long have you lived in Shelby County, Tenn.?

A. Since 1848.

Q. 3. What is your occupation, Mr. Stewart?

A. Nurseryman.

Q. 4. Does the business of a nurseryman include tree culture and a knowledge of trees?

A. Yes, sir, everything pertaining to trees.

Q. 5. Will you please describe the extent to which the business of a nurseryman applies with regard to trees?

A. It embraces them all—fruit trees and all manner of trees that grow in the soil.

Q. 6. Does it include cottonwood trees, poplar trees, pine trees, etc.?

A. Yes, and we have to have a knowledge of them all in every scientific point to be a nurseryman.

Q. 7. You say you have been residing in this county since 1848, will you please state how long you have been engaged in this business of a nurseryman and where?

A. I commenced it in infancy in Scotland, in England, and the balance of the time in Memphis or suburbs.

Q. 8. Have you been engaged constantly in that line of business in this county since 1848 to date?

A. Yes, sir.

Q. 9. Where did you begin the business after you arrived in Shelby County?

A. I was employed by Dr. Wheaton, a nurseryman here then. His nursery was northeast corner of Vance and Orleans Sts.

Q. 10. Were you long with him, Mr. Stewart?

A. I was with him about two and a half years.

Q. 11. Has your business and connection with trees in that time been only from the study of the books, or has it been a practical connection with tree culture?

A. In all cases it has to be practical, reading the books doesn't amount to a row of beans.

Q. 12. You have read also upon the subject, have you?

A. Yes, sir, studied, read and practiced, and come in contact with the best authorities on this nursery business.

Q. 13. Do you understand the theory of ring growth in trees?

A. Yes, sir.

Q. 14. Will you please state what ring growth means?

A. Ring growth means a ring is formed at each growth. A tree in the spring commences and makes its growth, and some trees that growth is made as early as April; then it forms a ring and rests, then a second growth commences and that will form a ring in perhaps July; then a third commences, and that finishes up its growth in October. These, however, are unusual, they are not a rule. Sometimes a tree makes only one growth a year; hence only one ring, or two or three as it may be.

Q. 15. What would be the condition and the kind of tree that would ordinarily make more than one growth a year?

A. All soft wooded trees are liable to do so, especially under favorable circumstances, such as deep, rich, alluvial soil, with plenty of moisture, and again pine trees have been known planted in cemeteries where the roots went down into the graves and fed on the decomposition to have grown so luxuriantly as to make three rings in a year.

Q. 16. Have you ever known yourself an instance of the last kind?

A. Yes, sir.

Q. 17. Please state the case.

A. In Elmwood Cemetery, about 1878, complaint was entered by the owners of a lot, and a yellow pine tree requested to be cut down and taken away. This was done. I had the curiosity to count the rings and there 75 of them. Now, these hands (my own) planted the tree 25 years previous to 1878, and it was then a seedling.

Q. 18. Take the case of a cottonwood tree growing on the margin of the Mississippi river. What would you say about its probability of forming more than one of these rings a year?

A. The probability is that it would make two growths a year for the first 20 years, and then it might cease and fall back only one growth. It might even make three growths a year.

Q. 19. What would be the causes that would excite these additional growths ordinarily?

A. Extra vigor of the tree, young, healthy, vigorous and well fed at the roots.

Q. 20. Would a cottonwood tree growing on the margin of the Miss. river or near it, ordinarily find vigor at the roots?

A. Usually they are obstruction to the river and catch all drift that is coming along and feed upon it.

Q. 21. I ask you now please to examine two specimens said to have been taken from one cottonwood tree now present before you and examine the rings, if there are any upon those specimens or cross-sections, state the diameter of the cross-sections and the number of rings you find in each specimen?

(The witness refers to the specimens referred to, which are lying on the floor before him). The witness after having examined the said specimens proceeds to answer as follows: I examined these specimens some days ago and again to-day. They are two of these specimens, the large one cut apparently from the butt of the tree, about three feet from the ground and the other specimen cut from the trunk of the tree about 14 feet from the

ground, as I am informed. The diameter of the larger specimen is 42 inches one way and 38 inches the other, by which I mean that the specimen is not exactly circular, but longer one way than the other. The other specimen is practically circular and its diameter measures 38 inches, I counted on both occasions 37 rings in the larger specimen and 36 in the smaller one. The difference is accounted for from the fact that the smaller specimen grew fourteen feet above the ground and eleven feet above the larger specimen. The piece above was not in existence when the lower one was, and hence the difference in the rings. Counsel for Ayres admits that the two specimens as to which the witness has just testified were recently taken from the trunk of the tree cut down by Ayres and Lawrence, as testified to by them in this case.

Cross-examination for defendant by Judge Heiskell:

Q. 1. Mr. Stewart, what trees do nurserymen cultivate for sale in this climate, what trees do they deal in?

A. All manner of evergreens, and all trees come under the head of shade trees, pines, juniper, magnolias, spruces, forest trees; forest trees consist of maple, ash, elm, poplar and even cottonwood, lombardy poplar, then catalpa and wild cherry, the penlonia.

Q. 2. How many cottonwoods have you ever sold since you have been in the nursery business, Mr. Stewart, in Shelby county?

A. About two dozen; they are very seldom ever called for—

Q. 3. The demand for them is very small, is it not?

A. Exceedingly small. It is only some old people who cling to memory that wants the same thing. If an old Virginian comes here the first thing he wants a persimmon.

Q. 4. Your practical experience then with cottonwood is quite limited?

A. Quite limited, yes, sir. The cottonwood tree is so near related to the magnolia and tulip tree that we regard them as one, the treatment is the same, the habits and customs the same.

Q. 5. What character of trees did Wheaton raise when you were with him?

A. He had a general nursery of all sorts—the ones that I have named above, and also including all fruit trees.

Q. 6. After a tree gets to a certain age does it grow as fast as it did when it was young?

A. No, sir.

Q. 7. Did you ever grow any cottonwood, Mr. Stewart?

A. Yes, sir.

Q. 8. To what size did you grow them before you disposed of them or destroyed them?

A. About fourteen feet high, and about as thick around as your waist.

Q. 9. Can you tell at what age a tree begins to slow up on its growth?

A. About at an average of 25 or 30 years.

Q. 10. What would the elmwood pine tree you spoke of in your examination in chief measure across the stump when you cut it down?

A. I must confess I can't say. I didn't notice it. It would perhaps be about 2 1-2 to 3 feet or so. I don't recollect exactly about it.

Q. 11. Rings in trees are more numerous near the ground than higher up, are they not?

A. Yes, sir.

Re-examination by Mr. Trezevant for complainants:

Q. 1. What is the tulip tree?

A. It is the tulip tree, but understood to belong to the white poplar. It is commonly known here as the white poplar.

Q. 2. You were referring in your direct examination to elmwood, what do you mean by elmwood?

A. I mean Elmwood Cemetery adjacent to the city of Memphis.

Q. 3. Please identify the specimens from the cottonwood tree to which you have referred by your initials?

A. I do so and mark them J. S.

And further deponent saith not.

James Stewart.

Subscribed and sworn to before me, this 2nd day of January, 1896.

(Seal.) F. M. Guthrie,
Notary Public.

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7. Mr. Bates, a witness for the plaintiff, then testified as follows:

Examination by Mr. Randolph:

Q. What is your name?

A. Bates.

Q. How old are you?

A. I am fifty-seven years old.

Q. Where do you live?

A. In Lauderdale county.

Q. How far from this land in dispute?

A. I live three miles from Flower Island.

Q. How long have you been living there?

A. About thirty years.

Q. Do you know anything about the original island?

A. No, sir; not the old island.

Q. What opportunities have you had for knowing this island?

A. I go to look after my stock, and I am very fond of hunting and there is good hunting there.

Q. How long have you been in the habit of going down to this island?

A. Twenty-five or six years.

Q. State what you know about a body of water on the east side of the Tennessee shore?

A. There is a body of water there supposed to be about a mile long.

Q. Which way does it extend?

A. The water?

Q. Yes, sir. Do you mean it is in the bed of Old River or not?

A. In the bed of Old River, yes, sir.

Q. How wide is that?

A. Different widths. Some places may be twenty yards or more; thirty, maybe forty.

Q. The one body extends on the east side?

A. Yes, sir.

Q. Are there any pools of water?

A. Yes, sir; there is another pool where Cotton Lake to Old River. It stands there all the time, and it is forty feet long and twenty feet wide.

Q. Is there much water in there?

A. Very little, the bed seems to be very soft, can't cross it.

Q. How is that?

A. I say the bed of the river, Old River, above this mile of water hasn't a great deal of water in it but seems to be very soft and dangerous crossing until you get way up.

Q. What was the character of the land just across from Old River going north.

A. Higher as we went away from Old River.

Q. And lower going east?

A. Yes, sir.

Q. What was the character of the timber?

A. The biggest timber was in the middle of the island, these trees measured thirty inches.

Q. What kind of timber?

A. Mostly cottonwood.

Q. Do you know or not how long it would take a tree to grow to be of the diameter of thirty inches?

A. No, sir.

Q. You never noticed that?

A. No, sir.

Q. Do you know anything about a little back bone there and do you know anything about the timber on it?

A. Yes, sir.

Q. There is a little high point at Crutcher Lake?

A. Well, it is pretty high but very narrow.

Q. What about the timber?

A. There is bigger timber in the middle of this island than there is there.

Cross-examination by Mr. Randolph:

Q. This place you call Old River is indicated by what? What crosses it and what shows it?

A. It is just a stream there.

Q. Just a stream with what appeared to have been banks once?

A. Banks on the east side.

Q. How long does that extend there?

A. The bed of Old River, take the whole of it would be six or seven miles.

Q. On the east isn't there a higher bank than on the west?

A. Yes, sir.

Q. Doesn't that country all around there drain in there?

A. Which?

Q. Are there not a great many streams that drain into Old River?

A. I don't know but two?

Q. Where are they?

A. That long hole of water and then about a mile above east or northeast Cotton Lake drains into Old River.

Q. That comes from where?

A. Up above?

Q. That water goes into what you call Old River?

A. Yes, sir; two places.

Q. How far were they above the Woodfolk grant?

A. I don't know the Woodfolk grant.

Q. You don't know the Woodfolk grant?

A. No, sir.

Q. Do you know who owns this land?

A. How?

Q. The land that they say this suit is about?

A. I don't know who owns it?

Q. What do you call it?

A. The island.

Q. What do you call the land right east of the island?

A. Polsdofer's land.

Q. Now, how far are these openings into the Old River above that land? These drains you call them?

A. I couldn't tell the exact distance.

Q. Are they above?

A. Yes, sir.

Q. Does Old River get dry in summer?

A. Places of it goes dry.

Q. The water just stands there?

A. Yes, sir.

Q. Has it no outlet?

A. It doesn't show any outlet?

Q. Just water standing there?

A. Yes, sir.

Q. What year did you go there?

A. About 1859.

Q. When did you go there to live?

A. Where am I living now?

Q. Yes.

A. I can't say, I was raised there, my father moved there about 1854 or '55. After the war I came back there.

Q. When did you live close to this land?

A. About thirty years ago.

Q. About thirty years ago? Then you came back in 1869?

A. Yes, sir.

Q. Don't remember any old Flower Island?

A. No, sir.

Q. Have you seen any island in between this land and the Arkansas shore since you went there?

A. There is land there now, a bar and tow-heads.

Q. Bars and tow-heads are different things from islands? You call them tow-heads some people call them islands. You haven't seen any island separated from the land by water there?

A. No, sir.

Q. Do you know what sheriff comes down there and serves process?

A. Price is our deputy?

Q. Where does he live?

A. He lives there.
Q. Do you know who arrests people on the island?
A. No, sir.
Q. Now, who collects the taxes?
A. I don't know.
Q. Does he live on this land?
A. Price don't, no, sir.
Q. Lives close to it?
A. Lives close to it, yes, sir.
Q. How many people live on this land?
A. On the island?
Q. Yes.
A. I don't know of but one family now, a negro family.
Q. What is the name?
A. I heard his name called.
Q. John Bell?
A. Yes, sir.
Q. Is he in the Fortner house?
A. Yes, sir; he was the last time I was up there.
Q. When were you up there?
A. About a week ago.

Cross-examination by:

Q. These drains that run into Old River, they are not creek, they are just outlets to these lakes, aren't they?
A. The drain that comes into Forked Lake?
Q. Yes.
A. Forked Lake drains all the time.
Q. I understand that, but is it a running stream all the time?
A. No, sir; I don't think it is.
Q. It is just a bayou that when the lake gets large it empties into Old River.
A. When there is a big rain.
Q. The same way with the other?
A. Cotton Lake?
Q. Yes.
A. Pretty much so.
Q. Old River is there?
A. Yes, sir; Old River is there.
Q. From thirty to sixty yards wide?
A. From twenty to forty.
Q. Yes, but that is what you did say?
A. There is no running water in it from any place.
Q. Is there good fishing in Crutcher Lake?
A. Yes, sir; the best we've got.
Q. You say you have the island since 1869?
A. Well, yes; about that date.

Q. How many acres were there in 1869?

A. On what you call the island now?

Q. Yes.

A. I suppose there was between seven and eight acres.

Q. Seven and eight hundred acres then?

A. That was my idea about it. It was as large then as it is now, that is my idea.

Q. Well, that is your idea, that it would have the same number of acres now as it had then?

A. Yes, sir; I suppose so.

Q. You are not very accurate about the number of acres. There is larger timber below the high point?

A. Yes, sir; I say the timber is about the middle of the island. It is larger than down there.

Q. Did you notice the cottonwood at the head of the backbone a cottonwood tree that measured sixteen feet around, or more?

A. No, sir; I don't think there is a tree there that big.

Q. You would have sworn there was no tree there that large?

A. No, sir; there is not a tree there that large.

Q. That larger timber, as I understand it, is down from this high point or backbone down towards Coal Creek?

A. Yes, sir; about the middle of the island.

Q. And right on a line with this backbone?

A. No, sir; the backbone stands a little west.

Q. This timber is east to where the backbone would run down?

A. Yes, sir; I would call it east some.

Q. Any cane on that island?

A. One or two patches big as this room.

Q. No more than that? Isn't there acres and acres of it just north of this backbone?

A. On the island?

Q. Yes?

A. No, sir.

Q. This Fortner house, how far is that and in what direction from the backbone or Crutcher Lake?

A. It is about four hundred yards from the Fortner house out to the lake.

Q. That is going from the Fortner house out to the lake you go across this high point?

A. We go a little north from the Fortner house to get to the lake.

Q. Then there is a slight depression after you leave the high point in order to cross over to the Fortner house?

A. Yes, sir.

Q. Then what is the lay of the land from the Fortner house towards the Tennessee shore?

A. Well, this ridge and a good many heights across—

Q. But isn't the general drain and slope towards the Tennessee shore?

A. No, sir.

Q. From the high point to the Tennessee shore?

A. No, sir; from the backbone out to the island it is a low place.

Q. How is it? Is there a gentle slope or decline from the backbone towards the Tennessee shore on the east side?

A. No, sir; I don't think there is, in fact, I know there isn't.

Q. You don't think there is? Well, what is your opinion—

A. Well, I think the formation of the island—

Q. What is your opinion about the lay of the land?

A. I think it is higher from the Fortner place back out to the middle of the island.

Q. Back east from this backbone?

A. Back east from this backbone.

Q. Then from the highest point to the Tennessee shore how high is the land?

A. The Fortner house is about the average, and it is about as high a point as there is on the island. But the backbone, I don't know whether it has higher land on it.

Q. What is the lay of the land from the Fortner house to the Tennessee shore, is it higher?

A. No, sir, I don't understand.

Q. My question is, what is the lay of the land, is it higher as you go towards the Tennessee shore or lower?

A. I can't answer that.

(Mr. Randolph:)

Q. Is that backbone on the Polsdofer land or above it?

A. I can't tell you that.

Q. How is it with reference to Crutcher Lake, is it above or below it?

A. It is a little above the low end of the lake.

The Court:

Q. When you speak of the Tennessee shore what do you mean? The original Tennessee shore?

A. The Tennessee shore where Old River runs right along it.

Q. You call that the Tennessee shore from the banks of Old River?

A. Yes, sir.

(Judge Heiskell:)

Q. When I speak of the Tennessee shore I mean where the Old River runs, the old original Tennessee shore. You say you don't know whether the land rises or falls from Old River out two hundred yards? You strike the first high ground and it is about like what it is up to the Fortner house?

A. There is very little difference.

Q. That two hundred yards—

A. I can't tell—

Q. Isn't it lower?

A. I suppose it is, there are some places in the bed of Old River.

Q. The Old River has water in it all the time? Every season? And don't the water go down where it is lowest?

A. Yes, sir.

Judge Flippin:

Q. How high are the banks of Old River on the east bank of Old River?

A. Well, the lowest are from eight twelve feet.

Q. Well, how high are the west banks of Old River?

A. No banks at all on the west.

Q. Then the land slopes down to here?

A. Yes, sir, if there is any slope at all it goes that way.

H. E. Price, a witness for the defendant, Thomas H. Price, who testified as follows:

Examination by Judge Flippin:

Q. Your name is H. E. Price?

A. Yes, sir.

Q. You are a son of the defendant in this suit?

A. Yes, sir.

Q. Where do you live, Mr. Price?

A. In Lauderdale County.

Q. How far from this land in dispute?

A. About two miles.

Q. How long have you lived there?

A. We've been there somewheres about thirty years. I come there quite young.

Q. Well, what opportunities have you had for knowing this land in controversy?

A. Well, sir, I have been over it right smart. I hunt and

fish of late years over there.

Q. You have been north of there and have business there?

A. I hunt wild turkeys and duck over there.

Q. You say you have been there for twenty or thirty years?

A. Yes, sir.

Q. What do you know, if anything, about Old River? What water it contains on the Tennessee shore up east?

A. If you give me that map I can explain to the jury much better.

Q. Well, you had better come right around here so the jury can see it, I guess. That is Old River along here?

A. Yes, sir, and here is Old River, you strike water from one end of the year to another and about here to the mouth of Coal Creek when it is dry you can ride across here. From here quite a way up there is just water and now and there right back of the Fortner place after you get to the water and pass it then it is dry and you can cross here. From here on down it is marshy and dangerous to ride across any place, and right in here is the first formation according to my idea. As you go from here going north.

Q. As you come from here going north or west does the land go upwards or downwards?

A. Right along there is where the fishing place is.

Q. You have been in Old River?

A. Yes, sir.

Q. And there is plenty of water for fishing there?

A. Yes, sir, that is where I fished all the time.

Q. How long does that water extend?

A. It extends along there for a mile all the time and from there on up it gets dry in the dry season of the year.

Q. Well, is the bed of the Old River well defined?

A. Yes, sir.

Q. How wide is that Old River?

A. It varies in width, it will average from ten to twelve feet from one end to another.

Q. In going from here up north, that is west, does the land begin to climb upwards or downwards?

A. Going from here it goes like that until it gets up about here, this is all new formation, and the water drains from this land this way and this way.

Q. Do you know anything about the ridge they talk about?

A. Fortner ridge, yes, sir.

Q. Where is that?

A. It is a little high ridge in here and there is a little bit of cut in here where that ridge comes, and it is where the comes to the water and it goes right back in here and comes down the old land into what you call Hepright Pocket.

Q. Now, where then is this Crutcher Lake? Where might that run with reference to Old River?

A. Well, it goes down to Crutcher Lake and the water doesn't go any farther than about here, and this comes down and strikes what you call the Hepright Clue Right, and it follows that on down and comes into the creek, that is Coal Creek.

Q. That is what you know as Old River then?

A. Yes, sir, comes right along and goes into Coal Creek there.

Q. Now, tell the jury where the Fortner house is. Now where is that upon this map? Locate it.

A. Yes, sir. Here it is here.

Q. On the north and western boundary of the Woodfolk grant?

A. Yes, sir.

Q. That is it?

A. Yes, sir.

Q. Now tell us something about the character of the timber down on the island.

A. Well, the timber on that island corresponds—

Q. I will ask Mr. Price to be careful to designate on the map these places.

A. Well, just about here is where the water commences, the water in Old River. It commences at C. there. Well, there is no solid water up here, and from A. towards Coal Creek down to B. the water will run very solid from one end of the year to another. From B. Coal Creek goes dry. From A. on back to C. you will find water along from A. to C. water along there on a continuous body. From C. on to Crutcher Lake is just an impression of Old River.

Q. Now tell us something about the timber down on that island.

A. The timber compared with the Tennessee shore is small.

Q. Is small?

A. I mean the same kind, it is very small. The timber is that on this island is cottonwood, principally all of it.

Q. About the cottonwood, is it a rapid or slow growth?

A. It is a rapid growth.

Q. Have you any idea how long it would take cottonwood to grow to be about twenty inches in diameter?

A. I don't know.

Q. What about the banks of Old River on the east next to the Tennessee shore?

A. From the mouth of Coal Creek until you get to Crutcher Lake it will average about six feet from one to another and some places twelve feet.

Q. I understood you to say Old River was fifteen feet wide?

A. I said feet, I meant yards. About ten or fifteen yards.

Q. Well, now in going west from Old River do you go up hill or down hill?

A. Well, it isn't much of a hill at all.

Q. When you hit the bed of Old River going west, that is towards the Mississippi River?

A. Yes, sir, the land is an incline until you get out probably a hundred or two miles and then it is still higher.

Q. Well, then, in going up towards the foot of Crutcher Lake what about the lay of the land?

A. My understanding of Old River it runs right around Crutcher Lake.

(Judge Heiskell:)

Q. I don't know what he means by "my understanding."

A. From the people there and the marks of the land, shows from Crutcher Lake to the Tennessee shore is very small.

Q. And that shows that the growth all along Crutcher Lake and down through from Fletcher Lake down here back this way, in those portions of the timber land east of Crutcher Lake, and the slough is large timber?

A. Towards Old River?

Q. Yes.

A. It is an incline toward the Fortner house.

Q. Towards the Fortner House?

A. Yes.

Q. Now wait. When you strike it it is sort of that way?

A. Yes, an incline from the Fortner House, and goes that way and incline from the back bone goes that way, and from Crutcher Lake that way.

Q. You say it goes down from the west from the Fortner House then the incline, and then from the back bone, then from Crutcher Lake and it goes down toward Old River?

A. Yes.

The Court: I understand Judge Flippin when they ask about the Tennessee shore they call it by different names?

A. That is the east bank of Old River, and they prove that it is three miles from the river now.

Judge Flippin continues:

Q. How far is the State of Tennessee from the east bank of Old River at this time?

A. The State of Tennessee from the east bank of Old River?

Q. Yes.

A. Well, the State of Tennessee is right on the bank of Old River.

Q. You know where the State of Tennessee is—the old grant? Aren't you convinced about that yourself? Old River is between the State of Tennessee and this island?

A. Yes, sir.

Q. And then on the east bank of Old River, how far is it on to solid ground?

A. The old bank goes right up to the Old River bank; there is cotton wood trees on top of the Old River bank, four to five feet through.

Q. Which side?

A. On the Tennessee side.

Q. One question—is that island in controversy here now— is it nearer the Tennessee than the Arkansas shore from the middle of the river?

A. It is on the east side of the channel of the Mississippi River.

Q. Well, about that timber on way up there about Crutcher Lake; what do you know about that?

A. It is small.

Q. What would be the average diameter of that timber?

A. Right around Crutcher Lake I suppose it would average—well, take an average it would be very small — eighteen to twenty inches; something like that.

Q. Eighteen to twenty inches—something like that, you say?

A. Yes, sir, there may be some larger, but not much.

Q. The larger timber is an exception to the average, then?

A. Well, most of it is from eighteen to twenty inches in diameter; that is, I do not know—I do not understand circumference, and never did.

Mr. Randolph: You have some testimony in this case, this grant east of—

A. No, sir.

Q. I say, it is land made in front of the Tennessee shore?

Q. Did you execute process there?

A. Yes, sir.

Q. And collect taxes?

A. Yes, sir.

Judge Flippin: Who has paid the taxes on this land in controversy?

A. My father.

Q. How many years has he paid it?

A. Well, I don't know.

Q. Have you any papers that you can produce that indicate how many years he has paid taxes on it?

A. Yes, sir.

Q. Well, produce them.

Witness produced paper from his pocket and started to read same. Mr. Randolph objected, and the objection was sustained, the court saying: What Price knows himself about the collection of the taxes he may testify about.

Judge Flippin continuing:

Q. Do you know whether this property was assessed to your father, or not?

A. I do not know it personally.

Q. Do you know personally whether he pays the taxes or not?

A. Yes, sir.

Q. And he pay the taxes?

A. Yes, sir.

Q. Do you know how many years he has paid the taxes?

A. In 1894-5-6-7.

Q. Have you, in your duties as deputy sheriff, ever met with any of the Arkansas authorities?

A. No, sir.

Q. Anybody been over there to interfere with you from Arkansas?

A. No, sir.

Q. This land is all on the east side of the channel of the Mississippi?

A. Yes, sir.

Q. How has that land been formed? Can you tell?

A. The part that has been made since I came there, I suppose I can.

The Court:

Q. Designate by some letter on the map the places you point out to the jury.

A. This is a dotted line of Hepright Pocket, the line west of this dotted line.

The Court:

Q. As a matter of fact which of the lines?

A. The dotted line which I marked and all of the land east of that has been made since I have been in the state of Tennessee.

Q. Has that land been formed by attaching on that side—

A. This land has been formed by a bar made out this way west from the dotted line and a mud bar formed right out there and finally little willows growed up on it.

Q. Between that and the bank?

A. Yes, sir. And finally the water went away and it filled in and attached itself to this old land that was made there before I come there. This part in here and there has never attached. This Hepright Pocket slough has water from T. to D, has water all the time from one year's end to another.

Q. Has it an outlet in the river?

A. This water comes into Coal Creek.

Q. Does it go into the river?

A. No, sir, into Coal Creek.

Q. Where does Coal Creek come from? From the hills?

A. Yes, sir, comes down there. Well, I don't know where the head waters are.

Q. But the head is up in the hills and it runs into the bottom?

A. Yes, sir, and Hepright slough has an opening into Coal Creek. You call this Old River and the people know this as the mouth of Coal Creek, and this as Old River.

Q. What is the distance from what you call Old River to the actual mouth of Coal Creek?

A. From here to here I suppose it is three-quarters of a mile.

Q. But the mouth to-day is way down here. How far is that?

A. A mile.

Q. From what you call the mouth of Cole Creek to the mouth of the river is about a mile?

A. Yes, sir.

Q. That is all formation in here?

A. Yes, sir.

Q. All solid land except there where the water is and all on the east side of the main channel of the Mississippi?

A. Yes, sir.

The Court:

Q. How many acres of land between the banks of Old River and the river as it now runs?

A. I suppose to take it all around from here, I expect it would be close to 5000 acres.

(Mr. Randolph:)

Q. 5000 acres? But in getting that you come around to Plum Point?

A. That is all formation.

Q. All formation?

A. Yes, sir, bars formed all there.

Cross-examination by Judge Heiskell:

Q. You gave your deposition in another case four or five years ago?

A. Yes, sir.

Q. Did you ever say anything about that Hepright drain?

A. I don't know that I said anything about it.

Q. The same question between Mr. Ayres and your father was then in controversy as is here one of the questions, wasn't it?

A. Between Mr. Ayres?

Q. Yes.

A. I think it was Hunter and Fry.

Q. You claimed that land belonged to you?

A. Yes, sir.

Q. That is the same question?

A. Yes, sir.

Q. Your deposition was taken?

A. No, sir, I don't think it was.

Q. Look at that deposition and see if you ever said anything about this Hepright slough.

A. I don't know that I did.

Q. Do you know that you didn't?

A. I won't say that, because I don't remember.

Q. Is that running water now?

A. No, sir, not running water.

Q. But there is water there now? When did you see water there last?

A. I saw it a week before I come here.

Q. A week before you come here? And it is there all the time?

A. Yes, sir, it is there all the time.

Q. I understood you to say just now that Old River lies between the island and the Tennessee shore? That is so, is it?

A. Yes, sir.

Q. That is right?

A. Yes, sir.

The Court:

Q. Judge Heiskell, you asked him the question whether Old River lies between the island and the Tennessee shore, what island did you mean, the Old island or the present one?

(Judge Heiskell.)

Q. Does it lie between what you call the island now?

A. Of course, I don't know anything about the Old Island.

Q. How long since you have been to Crutcher Lake?

A. How long since I have been to Crutcher Lake?

Q. Yes?

A. It has not been over two weeks.

Q. When you were there did you examine the timber particularly?

A. I can't say that I did, I didn't go there for that purpose.

Q. Isn't it a fact that the Fortner house is three or four hundred yards from Crutcher Lake? I mean the backbone?

A. Yes, sir; that is my idea.

Q. And isn't there a clearing of land up nearly to the backbone from the Fortner house?

A. I believe there is.

Q. Then all the large timber has been cut out?

A. There hasn't been any there.

Q. There hasn't been any there?

A. There hasn't been any there.

Q. You mean to say there is no timber there?

A. Yes, sir; that is what I mean to say.

Q. Do you swear that?

A. I say it most positively.

Q. None at all?

A. No, sir.

Q. I understand you to say the large timber is below Crutcher Lake?

A. Yes, sir.

Q. How far from the Tennessee shore?

A. Well, it isn't so very far, the timber that is the

large timber sorter stands near the middle of this island, of this Flower island, you call that Flower island.

Q. And right in the center is the large timber?

A. Right in the center, I call it the center, is this large timber.

Q. Well, then you would be a little east on a line with the high point of Crutcher Lake, the backbone?

A. I would call it a little southeast.

The Court:

Please designate this backbone and the lake accordingly.

A. The backbone is right at the foot of Crutcher Lake, where the lowest part of the water is from Crutcher Lake, and right in here is a small washout. Well, now, this little backbone is right in there from PP. Now, right at the foot of Crutcher Lake is that little high Fortner place, and there is a little washout right at the head of it.

(Judge Heiskell.)

Q. How large did you find the timber?

A. The largest part of the timber?

Q. Yes?

A. It will run from twenty-four or probably you can find trees thirty inches in diameter. I think you will get trees thirty inches in diameter.

Q. You never saw a tree that they cut there in 1895?

A. No, sir.

Q. Didn't see that section of it when we were trying that case?

A. No, I never saw any of it.

Q. I understood you to state that the land from the Fortner house to the Tennessee shore was a decline?

A. Was a decline? Yes, sir.

The Court:

Q. Now, you mean from here to Old River?

A. From here to Old River, yes, sir.

(Judge Heiskell.)

Q. From the backbone of Crutcher west to the present Mississippi River, how is the lay of the land?

A. Right due west from Crutcher Lake there is very small timber on that part, I can't ride over the other part—

Q. The indication is that this was made from Crutcher to the present Mississippi River?

A. Yes, sir.

Q. There is no doubt about that according to the indication?

A. According to the indication there is not.

Q. Can you state, Mr. Price, the size of the timber from Crutcher Lake towards the Tennessee shore? Whether it grows larger or smaller?

A. Well, sir, it grows from Crutcher Lake towards the Tennessee shore, it grows gradually larger, and as you come along out east of Crutcher Lake you come to smaller timber.

Q. I am speaking of the land running out from the Fortner house on to the Tennessee shore?

A. You mean from the Fortner house towards the Tennessee shore? I want to understand your question now. You mean what is the size of the timber from the Fortner house towards the original Tennessee shore towards Old River?

Q. Yes?

A. The timber grows smaller.

The Defendant, E. M. Ayres, introduced the following testimony:

(1.) A deed from Hugh R. McVeigh, Commissioner in Chancery, to the reading of which plaintiffs objected, as follows:

Know all men by these presents, that whereas a decree was rendered in the Circuit Court of Mississippi County, Arkansas, on the 21st day of November, 1882, in a cause therein pending wherein the State of Arkansas on the relation of Mississippi county was plaintiff and John Crawford, Auditor of Public Accounts of the State of Arkansas, and certain lands upon which taxes were alleged to be due, was defendants condemning to be sold for non payment of taxes, the following tracts or lots of land lying in Mississippi county, Arkansas, to wit: All of section 17, township 12, range 12 east 122 acres; all of section 18, township 12, range 12 east 35 acres; all of section 19, township 12, range 12 east 81 acres, and all of section 20, township 12, range 12 east 18 acres; in all, 256 acres, more or less; and whereas said lands were sold to John A. Lovewell for the sum of $8.74 at a sale made by Ben. H. Bacchus, Commissioner of said court, made by him at the court-house in the town of Osceola, Arkansas, on the 4th day of February, 1883, after having given notice of time, terms and place of sale in manner and form as required by law; and whereas the said John A.

Lovewell has duly paid to said Ben H. Bacchus the said sum of eight and 74-100 dollars, and whereas the said Ben H. Bacchus, Commissioner, was by said court, at the January term, 1884, removed from his said office as Commissioner, and I appointed in his stead, and whereas the time allowed by law for redemption of said lands has expired and I, Hugh R. McVeigh, as Commissioner appointed by said court in said cause, am directed by the court to execute a deed of conveyance conveying said lands to the purchaser. Now, therefore, know ye that I, Hugh R. McVeigh, Commissioner as aforesaid, for and in consideration of said sum of money and the premises aforesaid, do hereby grant, sell and convey unto said John A. Lovewell and unto his heirs and assigns forever the lands above described to have and to hold the same unto him the said John A. Lovewell his heirs and assigns forever.

Witness my hand and seal as Commissioner on this 22d day of July, 1884.

Hugh R. McVeigh,
Commissioner in Chancery.

State of Arkansas, County of Mississippi:

Be it remembered that on this day before me the undersigned, John B. Driver, a clerk of the Circuit Court within and for the county aforesaid, duly commissioned and acting, Hugh R. McVeigh, Commissioner, etc., to me well known as the grantor in the foregoing instrument, and acknowledged that he executed the same for the considerations and purposes therein mentioned and set forth.

Witness my hand and seal as such clerk of the Circuit Court, this 2d of June, 1891.

John B. Driver, Clerk,
By Will J. Driver, D. C.

Filed for record and recorded this October 19, 1891.

John B. Driver, Clerk,
By Will J. Driver, D. C.

Clerk's Certificate to Transcript.

State of Arkansas, County of Mississippi:

I, Hugh D. Tomlinson, Clerk of the Circuit Court within and for the county and State aforesaid, do hereby certify that the annexed and foregoing pages contain a true and perfect transcript of the deed executed by Hugh

R. McVeigh, Commissioner of the Circuit Court of Mississippi County, Ark., to John A. Lovewell, as therein set forth and as the same appears of record on pages 126 and 127 Record, volume 17, Mississippi County, Arkansas.

Witness my hand and official seal, this 1st day of August, 1894.

(L. S.) Hugh D. Tomlinson, Clerk.

State of Arkansas, County of Mississippi:

I, William H. Cote, sole and presiding Judge of the Second Judicial Circuit of the State of Arkansas and of the Circuit Court of Mississippi County in said State, duly commissioned and acting, certify that Hugh D. Tomlinson, who gave the foregoing certificate, is now and was at the time of signing the same, clerk of said court, and that said court is a court of record, and that his attestation is in due form and his official acts as such are entitled to full faith and credit. In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in Jonesboro, Arkansas, on this 8th day of August, 1894.

(L. S.) W. H. Cote,
Judge of the 2d Judicial Circuit of Arkansas.

State of Arkansas, County of Mississippi:

I, Hugh D. Tomlinson, Clerk of the Circuit Court of Mississippi County, State of Arkansas, duly commissioned and acting, certify that William H. Cote, whose genuine and official signature appears to the above and hereto annexed certificate, is, and was at the time of signing the same, sole and presiding Judge of the Second Judicial Circuit of Arkansas, and of the Circuit Court of Mississippi County in said State, duly commissioned and qualified, and that all of his official acts as such are entitled to full faith and credit. In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in Osceola, Arkansas, on this 10th day of August, 1894.

Hugh D. Tomlinson,
Clerk of the Circuit Court of Mississippi County, Arkansas.

To the reading of which plaintiff objected as follows: (1) That the deed was not admissible unless the decree and legal proceedings are introduced. (2) By the laws of Arkansas the proceedings are void. The court over-

ruled the objections and allowed the same to be read, to which the plaintiff excepted.

(2.) A plat and survey made by Daniel Miller of fractional section 24 on the Arkansas shore and fractional sections 17, 18, 19 and 20 an island in the Mississippi River, purporting to be certified by the Commissioner of State lands of the State of Arkansas; and also the paper marked Exhibit O. This plat is p. 257 of this transcript marked there Ex. 3, purporting to be certified by the same officer. They are as follows: To the introduction of which papers the plaintiffs objected; and thereupon the court sustained the objections and refused to let said paper be introduced, and the defendant, E. M. Ayres, excepted.

Exhibit O.

Township No. 12 north; Range No. 12 east; District of Helena, now Little Rock, Ark.

Description of tract: Section 17, Township 12 N., Range 12 E.

Description of tract: Frac. Sec. 17, Township 12 N., Range 12 E.

Description of tract: Frac. Sec. 18, Township 12, Range 12; 158.01 acres; $1.25 per acre; purchase money, $197.51; Hardimwan, purchaser; date of sale Dec. 2, 1836; number of receipt and certificate of purchase, 3750.

Description of tract: Section 19, Township 12, Range 12.

Description of tract: Frac. Sec 19, Township 12, Range 12.

Description of tract: Frac. Sec. 20, Township 12, Range 12; 99.70 acres; $1.25 per acre; purchase money, $124.63; John C. Barnes, purchaser; date of sale, 27 June, 1846; number of receipt and certificate of purchase, 4780.

U. S. Land Office, Little Rock, Ark.

January 28, 1898.

I, William G. Whipple, register of the United States Land Office at Little Rock, Ark., hereby certify that the

above and foregoing is a full, true and literal copy, showing the entry and disposal of said tracts of land, as shown by the tract book in this office.

Witness my hand this January 28, 1898.

Wm. G. Whipple, Register.

State of Arkansas, City of Little Rock.

I, Alexander C. Hull, Secretary of State for the State of Arkansas, do hereby certify that the attestation of William G. Whipple whose name is attached to the foregoing certificate is in due form and by the proper officer.

December 20th, 1899.

Alex. C. Hull, Secy. of State of Ark.,

(Seal.) By Eugene B. Jett, Deputy.

Fees, $2.50.

(3) The defendant then introduced a deed from John A. Lovewell and wife Maggie Lovewell to E. M. Ayres, which is as follows:

Warranty deed with relinquishment of dower.

Know all men by these presents that we John A. Lovewell and Margaret Lovewell his wife, for and in consideration of the sum of three hundred ($300) dollars to us paid by E. M. Ayres do hereby grant, bargain, sell and convey to the said E. M. Ayres and unto his heirs and assigns forever the following lands lying in the county of Mississippi and State of Arkansas, to wit: All of fractional section 17; all of section 18, section 19, and all of section 20 in township 12, range 12 east together with all the accretion thereto attached or belonging; to have and to hold the same unto the said E. M. Ayres and unto his heirs and assigns forever with all the appurtenances thereunto belonging. And we hereby covenant with the said E. M. Ayres that we will forever warrant and defend the title to said lands against all lawful claims whatever, and I, Margaret Lovewell wife of the said John A. Lovewell for and in consideration of the said sum of money do hereby release and relinquish unto the said E. M. Ayres all my right of dower in and to said lands.

Witness our hands and seals this 2d day of August, 1884.

John A. Lovewell, (Seal.)

Maggie Lovewell, (Seal.)

Acknowledgment.

State of Arkansas, County of Mississippi.

Be it remembered that on this day came before the undersigned a justice of the peace within and for the county aforesaid duly commissioned and acting, J. A. Lovewell to me well known as the grantor in the foregoing deed and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth. And on the same day also voluntarily appeared before me the said Maggie Lovewell the wife of the said John A. Lovewell to me well known and in the absence of her said husband declared that she had of her own free will signed and sealed the relinquishment of dower in the foregoing deed for the purposes therein contained and set forth without compulsion or undue influence of her said husband witness my hand as such justice of the peace this 16th day of August, 1884.

James Liston, J. P.

Certificate of Record.

State of Arkansas, County of Mississippi.

I, Hugh R. McVeigh, circuit clerk and ex-officio recorder in and for the county aforesaid do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 12th day of December, 1884, at 8 o'clock a. m. and the same is now duly recorded with the acknowledgments and certificates thereon in record book 13, page 255.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 12th day of December, 1884.

Hugh R. McVeigh,

(L. S.) Clerk and ex-officio recorder.

Township 12, Range 12, Mississippi County, Ark.

31	30	19 x	18 x	7	6
32	29	20 x	17 x	8	5
33	28	21	16	9	4
34	27	22	15	10	3
35	26	23	14	11	2
36	25	24	13	12	1

State of Arkansas, County of Mississippi.

I, F. G. Taylor, judge of the second circuit of the state of Arkansas do hereby certify that the annexed and foregoing attestation is in due form and by the proper officer this 2d day of November, 1899.

F. G. Taylor, Judge.

State of Arkansas, County of Mississippi.

I, Charles S. Dwier, circuit clerk of the county and state aforesaid do hereby certify that F. G. Taylor the presiding judge whose name appears to the above certificate is duly commissioned and qualified as the judge of the circuit court of Mississippi county, Arkansas this 6th day of November, 1899.

(L. S.) Chas. S. Dwier, Clerk.

To the reading of which deed the plaintiff objected as follows:

Objection 1. No possession shown that Lovewell has not been shown to be in possession.

Objection 2. No title from the United States to Arkansas has been traced. That no title from the United

States or the State of Arkansas or any other authority has been traced.

Objection 3. The land is in Arkansas and outside of Tennessee and the jurisdiction of this court; the deed shows on its face that it is for land in Mississippi county, Arkansas outside of the jurisdiction of the State of Tennessee or this court.

Objection 4. That the land described in the deed is not shown to be the same as the land in controversy but appears on its face to be different land.

Objection 5. That there is no proper proof of the deed as a deed conveying land in Tennessee and no proper acknowledgment under our statute and no record of the deed in any register's office in Tennessee.

But the court averred the objections and allowed the deed to be read to which the plaintiff excepted.

(4) The defendant Ayres then offered four tax deeds, one purporting to convey section 17, one section 18, one section 19, and one section 20, township 12, North range 12 east, one of which (Section 20) is as follows:

Clerk's Deed of Tax Sale.

Know all men by these presents, that whereas the following described property, to wit, all section 20, township 12 north and range 12 east, 18 acres, situate in the county of Mississippi and State of Arkansas was subject to taxation for the year A. D. 1894. And whereas the taxes assessed upon said real property for the year aforesaid remain due and unpaid at the date of the sale hereinafter named and whereas the collector of revenue of said county did on the 10th day of June, A. D. 1895, by virtue of the authority in him vested by law at the sale begun and publicly held on the second Monday in June, A. D. 1895, expose to public sale at the court house in the county aforesaid in substantial conformity with all the requirements of the statutes in such cases made and provided the real property above described for the payment of the taxes, penalty and costs then due and remaining unpaid on said property; and whereas at the time and place aforesaid E. M. Ayres of the county of Mississippi and the state of Arkansas having offered to pay the sum of one dollar and seventeen cents being the whole amount of the taxes, penalty and costs then remaining due and unpaid on said property for the above described real estate which was the least quantity bid for and payment having been by him made to said collector

said property was stricken off to him at that price. And whereas two years have elapsed since the date of said sale and said property has not been redeemed as provided by law; and whereas the said E. M. Ayres having produced and presented to me the certificate of purchase executed to him by the collector of revenue of said county.

Now, therefore I, H. D. Tomlinson, clerk of the county court of the county aforesaid in consideration of the said sum of money to the collector paid as aforesaid and by virtue of the statutes in such cases made and provided have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said E. M. Ayres, his heirs and assigns the real property aforesaid and more particularly described as follows, to wit: All section 20, township 12 north and range 12 east, 18 acres; to have and to hold unto him the said E. M. Ayres his heirs and assigns forever subject however, to all the rights of redemption provided by law.

In witness whereof I, H. D. Tomlinson, clerk of the county court aforesaid by virtue of authority aforesaid have hereunto subscribed my name on this 30th day of June, A. D. 1897.

H. D. Tomlinson, Clerk of the County Court
(L. S.) of Mississippi County, Arkansas.

Acknowledgment.

State of Arkansas, County of Mississippi.

I hereby certify that before me a notary public in and for said county, personally appeared the above named H. D. Tomlinson, clerk of the county court of said county, personally known to me to be the clerk of the county court of said county at the date of the execution of the above and foregoing conveyance and to be the identical person whose name is affixed to and who executed the above conveyance as clerk of the county court of said county and acknowledged that he as clerk of the county court of said county had executed the same for the considerations, uses and purposes therein contained and set forth and desired the same certified which is done.

Given under my hand and seal on this 30th day of June, A. D. 1897.

S. S. Semmes, Notary Public.

Certificate of Record.

State of Arkansas, County of Mississippi.

I, H. D. Tomlinson, circuit clerk and ex-officio recorder for the county aforesaid do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 30th day of June, A. D. 1897, and the same is now duly recorded with the acknowledgment and certificates thereon in record book 21, pages 106 and 107.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 30th day of June, A. D. 1897.

H. D. Tomlinson, Circuit Clerk, and
Ex-Officio Recorder,
By Jas. H. Lovewell, D. C.

Township No. 12, Range No. 12, Mississippi County, Ark.

NORTH.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	X X X X 20 X X X X X X X X	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

WEST. EAST.

SOUTH.

State of Arkansas, County of Mississippi.

I, F. G. Taylor, judge of the Second Circuit of the State of Arkansas do hereby certify that the annexed and foregoing attestation is in due form and by the proper officer. This 2d day of November, 1899.

F. G. Taylor, Judge.

State of Arkansas, County of Mississippi.

I, Chas. S. Driver, circuit clerk of the county and state aforesaid do hereby certify that F. G. Taylor the presiding judge whose name appears to the above certificate is duly commissioned and qualified as the judge of the circuit court of Mississippi county, Arkansas, this 6th day of November, 1899.

(L. S.) Chas. S. Driver, Clerk.

(Note. By agreement of the parties to this suit the other three similar deeds one for all Section 17, being 35 acres one for all Section 18 for 81 acres and the other for all section 19 for 122 acres are not copied into this transcript of the bill of exceptions. John B. Clough, Clerk.)

To the reading of which the plaintiffs objected as follows:

1. That these are tax collector's deeds.
2. That each is a deed that the clerk of the Circuit Court makes and made under authority of sale.
3. That the land is situated in Mississippi County, Arkansas, out of the jurisdiction of the court.
4. Because the State of Arkansas had no jurisdiction or authority to tax the land sued for in this suit that land being on the east channel of the Mississippi river and in the State of Tennessee.
5. This land is not shown to have been patented by either the State of Arkansas or State of Tennessee. Which objections were overruled by the court and the plaintiffs excepted.

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5. David H. Lawrence, being duly sworn, testified as follows, as witness for defendant, Ayres:

Direct Examination by Judge Heiskell:

Q. What is your name?
A. David H. Lawrence.
Q. Where do you live?
A. In Mississippi County, Arkansas.
Q. Near what point?
A. Near Osceola.
Q. What is your business?
A. I am a merchant at the present, and I have always been a farmer.
Q. How far is Osceola from what is called Flower Island?

A. I suppose if a man could go straight it is 12 or 15 miles something, like that; maybe not so far.

Q. Are you acquainted with Flower Island?

A. Yes, sir.

Q. How long have you known it?

A. Ever since 1864.

Q. State if you were ever on the island and how long you were there and when?

A. I was on the island in 1864, somewhere from August on up to Christmas, and I lived on the point right across from the island, on the Arkansas shore.

The Court: On Craighead Point?

A. Yes, sir.

Q. You were on the island how long?

A. I was on the island more or less after the crops were laid by, and up to October or November; I don't know how long. I didn't think so much about it.

Q. What took you there?

A. I went over there to keep out of the war.

Q. What business were you in?

A. I got there, and there was a man had some wood he wanted put on the bank, a man by the name of Gardner, and he says "If you will drive the oxen—

The Court: What Gardner said is not testimony.

A. Well, I went over there in 1864.

Q. Did you stay on the island all the time?

A. No, sir, I can't say that. Sometimes I was there.

Q. Where did you stay? What house, if any?

A. A portion of the time at what is known as the Hipp house.

Q. Whereabouts was the Hipp house?

A. Sort of on the lower end of it.

Q. How far was that house from where the Fortner house is now?

A. I don't know where the Fortner house is unless that is the house that stands there now.

Q. Well, it is right about there, I suppose? (Indicating on map.)

A. Yes, sir, right about there, (indicating).

Q. What was the character of the house in 1864?

A. It was a frame house, I believe, and had a room on the back, and it was getting a little old and dilapidated.

Q. A little old and dilapidated?

A. Yes, sir.

Q. From the appearances how old would you say it was at that time?

A. About fifteen or twenty years, I guess. It gets

so it looks older on land where it overflows quicker than it does anywhere else.

Q. What was the size of the timber cut in there in 1864?

A. From eighteen to twenty inches where this wood was cut.

Q. Where this wood was cut?

A. Yes, sir.

Q. In diameter?

A. Yes, sir.

Q. How many acres do you suppose—how many to your best judgment on that island in 1864?

A. I can not really enumerate, because it was a big place.

Q. A big place?

A. Yes, sir, it run off there and I never was right clear on the back of it.

Q. On the back?

A. Tennessee shore. I went out one time and went across to the Tennessee shore.

Q. How far was the Hipp house from the Fortner house above this, a half mile or three-quarters, wasn't it?

A. I don't know all of Flower Island. It was a big piece of land, and I didn't know anything except what they told me. Everybody called it Flower Island; I heard it called that. I had a brother that went down there and cut wood.

The Court: What your brother did is not evidence.

Q. Do you recollect the elevated point, or back bone, as it is called?

A. Well, that back bone was some of the high land when I was there.

Q. Where was that?

A. It was above this Hipp house.

Q. On the bank of any stream?

A. On the bank of the river—yes, sir. It was caving the last time I was there.

Q. Now the bank of what stream or body of water was that?

A. The Mississippi River.

Q. The Mississippi River in 1864?

A. Yes, sir.

Q. What is it now?

A. A lake you might call it—part of it.

Q. What lake do they call it?

A. Crutcher Lake.

Q. Now this backbone is right along the bank of Crutcher Lake?

A. Yes, sir.

Q. Now, Mr. Lawrence, what is the trend of the land from the Hipp house towards the Tennessee shore?

A. Well, it runs pretty level until you get out towards the Tennessee shore, and then it gets lower, and runs down, and there is a bank.

Q. How about the timber?

A. Well, it gets smaller down next to the Tennessee shore.

Q. Smaller down next to the Tennessee shore?

A. Yes, sir.

Q. State whether, or not, you were there in 1894 or 1895?

A. In 1894—yes, sir.

Q. State what you were there for—what you did, if anything?

A. Well, Ayres got me to go down there and look at it with him, and we went down and he cut down a tree.

Q. Where was that tree cut with reference to this backbone?

A. It is pretty nearly east. The river runs pretty near east and west.

Q. I mean what distance east from the backbone?

A. A half mile, or three-quarters.

Q. Towards the Tennessee shore?

A. Yes, sir.

Q. How many rings did that tree have from the center out?

A. Something over fifty; I think about fifty-five; I don't know—somewheres around there.

Q. That has been about four or five years ago when that was done?

A. Yes, sir.

Q. Now what else occurred between you and Ayres?

A. Well, we were talking about the age, and I told Ayres that that tree was a pretty old tree,—

Objected to as incompetent.

Q. Then what did you do in consequence of that?

A. Well, we went and cut into this tree, and found it to correspond with the other.

Q. Well, was the tree you cut into on the Arkansas shore above Osceola?

Gen. Heiskell:

We propose to prove by this witness here this question was raised, and in consequence of that there is a statement then made that in 1860 his brother had bored into a cotton wood tree standing on the same kind of soil,

on the main line, that had bored into for the purpose of getting water to drink, and then he found that tree, and blocked it out, and counted the rings, and they corresponded exactly with the number of years from 1860.

Q. As I understood you to state, this Crutcher Lake was the Mississippi River in 1864?

A. I don't think it was that far in. It was a little further out in 1864.

Q. Was it further out towards the Arkansas shore?

A. Yes, sir; from the best of my knowledge, because there was more high land than from which I cut wood in 1864. Now the high land, you say you cut the wood off.

Q. Now this high land, you say, cut the wood off?

A. Yes, sir.

Q. It was cut off this backbone?

A. Yes, sir.

Q. Now when were you at Flower Island last?

A. I was there the other day—three days ago.

Q. What day?

A. It was about last Sunday.

Q. What about the backbone then?

A. There was some of it there. The reason I say it was there, that was our high land in 1864.

Q. Was there any tree there?

A. Yes, sir.

Q. Where was that?

A. On the bank of the Crutcher Lake.

Q. Who was with you last Sunday?

A. Ayres.

Q. What was the size of that tree?

A. Well, we measured it up five or six feet high.

Q. How many feet around?

A. Thirteen feet, nine inches.

Q. Five or six feet from the ground?

A. I wouldn't say just how high.

Q. What was the character of the bark on that tree? I mean as to its roughness or smoothness.

A. Pretty heavy bark.

Q. Are you anything of a woodman?

A. I can't say. I have been used to wood, and cut a lot of wood, but never paid any attention about the rings until this thing occurred.

The further examination of this witness as an expert was objected to, and the objection was sustained on the ground that he had not qualified as an expert.

Q. That tree seemed to be a pretty old tree; in fact the trees all over that island are of a pretty good age?

A. I do not know.

Q. What is the general character of the timber on that island? I mean what does it appear to be on the older part of the island?

A. I didn't understand you.

Q. What is the general character of the timber on the older part of that island?

A. It sizes from thirty inches.

Q. Thirty inches?

A. Yes, sir. I reckon you might say larger. There is some of them larger. When I was there last Sunday we measured a tree that was thirteen feet, nine inches in circumference, and there was some of that backbone there yet.

Q. This one tree that you measured was 13 feet and 9 inches?

A. Yes, sir. As I stated, this island was a big body of land. I don't know except what they tell me, but when I went on it this Hipp house stood on it. I suppose from the looks of the land a good deal had made on to this side of the Tennessee shore.

Q. To look at the land, you say it looked as though it had made from the island to the Tennessee shore?

A. Yes, sir; from the island to the Tennessee shore.

Q. Did you notice any patches of cane on the island?

A. Yes, sir; there is some at some places over there.

Q. How large is that cane?

A. Between six and eight feet high. I have been along on this river and sand bars, and I never knew or seen any island that is new made land that I've ever seen any cane growing on it.

Q. You have never seen made land with cane on it?

A. No, sir; and I don't know except what I see.

Q. State whether you were on the island in 1865?

A. I think it was about four years ago.

Q. I said state whether you were on the island in 1865?

A. No, sir. Oh, yes—1865? Yes, sir; I was on the island. I helped a Dutchman who was a son-in-law of Hipps.

Q. Who else was there at the time you were there, except his son-in-law?

A. Some negroes.

Q. Some negroes belonging to old man Hipp?

A. Yes, sir; and his son-in-law made a crop there in 1864 on his father-in-law's place.

Cross-Examined by Mr. Randolph:

Q. How old are you?

A. Fifty-seven years old.

Q. Where were you born? In what year were you born?

A. In 1842.

Q. You speak of going to these premises in about 1864; where did you go from them?

A. Where did I go when I come to Arkansas—I moved from Osceola down to Craighead Point.

Q. When you went away in 1864 where did you go?

A. I do not think I left there from Craighead Point. I lived there until 1866.

Q. Where did you go then?

A. I went to Osceola.

Q. Where have you lived since?

A. I went back up to where I lived before I moved up there.

Q. Were you on Flower island between 1866 and a few years ago?

A. No, sir; I never was on it before 1864.

Q. You never saw the river there before 1864?

A. No, sir.

Q. Never did. On what side of Flower island was the main channel at that time?

A. It was next to the Arkansas shore.

Q. Between this land and the Arkansas shore?

A. Yes, sir.

Q. You never knew it anywhere else, did you?

A. No, sir; I never knew it anywhere else.

Q. Was Flower island joined to it on the east?

A. It doesn't join the Tennessee shore.

Q. You could cross over it?

A. Some places you could.

Q. But it was joined to the Tennessee shore, wasn't it?

A. Of course some of it was lower and some higher.

Q. The land was still further West when you were there in 1864 than it is now?

A. No, the river is still further now.

Q. It has made in there?

A. Yes; it has made in there and the river still gets nearer to the Arkansas shore, and nearer to Crutcher Lake.

Q. But in 1864 or 1865 the river was still so?

A. No, sir; the backbone was highest and the Hipp house.

Q. You never knew this island, or ground, in 1854?
A. No, sir.
Q. Nor in 1844?
A. No, sir.
Q. Nor in 1834?
A. No, sir.
Q. Nor in 1824?
A. No, sir. In 1864 was my first acquaintance with it.

Q. You have given a deposition in this case haven't you, Mr. Lawrence?

A. Yes, sir; and I think you will find it the same year.

Q. Is your name David H. Lawrence?

A. Yes, sir; that is my name—David H. Lawrence.

Q. Now you were asked this question in your deposition, were you not: "Who claimed to own this land when you were over there in 1864?" I am just reading you the question, and your answer is: "It went as the Hipp place, and the Hipp negroes were living on it. I remember to have moved a man by the name of Simon, who was Hipp's son-in-law in 1865." On what part of the island was this house located?

A. It was near the river.

Q. How far was this house from the main river?

A. Between two and three hundred yards from the river in 1865.

Q. Now that was about 200 yards from the East margin of the Mississippi River wasn't it?

A. Yes, sir—you mean—

Q. I mean you had to go two or three hundred yards to get to the margin of the Mississippi River?

A. Yes, sir.

Q. Now, Mr. Lawrence, you were asked how much land was on Flower island in 1864, and you answered as follows:

A. There was a large amount of newly formed land on this island in 1864, but don't know how many acres; there was a place a half mile long on the upper end of the island I suppose, and I have no idea how wide it was, for I never went around to see.

A. There is some difference in my deposition first and last.

Q. I am not trying to involve you in contradictions. Do you know how much of this land West of the margin of the river has formed in there since 1864?

A. I don't know.

Q. Is it as much as a mile?

A. I don't know.

Q. Well, you ought to know?

A. No, sir; I don't know.

Q. When you were there how far did you go towards Coal Creek?

A. I was at Coal Creek in 1864.

Q. Now the two times you went there did you go to Coal Creek then?

A. Yes, sir.

Q. Now the other day did you go to Coal Creek?

A. No, sir.

Q. Do you know this grant known as the Woodfolk grant?

A. No, sir; I don't.

Q. You don't know anything about it?

A. No, sir.

Q. Now this Flower island that you speak of—doesn't it stand between the main channel of the Mississippi River?

A. Yes, sir; that is where the river is now.

Q. This is the only channel to it?

A. Yes, sir.

Q. You never saw the channel running East?

A. No, sir; it was always West.

Q. You have been asked something about the tree that you saw there the other day; did you measure that tree?

A. Yes, sir.

Q. Will you please describe the tree?

A. Yes, sir; I can describe it. It is a good large tree, growed up, and it is three feet around the roots, and the roots stand up high from the ground, a good deal, and it is forked above the ground.

Q. Where did you measure it?

A. Below the fork.

Q. How much did it measure?

A. Thirteen feet, nine inches.

Q. How much would that make it in diameter?

A. I don't know exactly.

Q. Isn't that what you call a swell budded tree?

A. Yes, sir; something like one. It isn't a real swell budded tree. We have what you call a swell budded tree and they will be a good deal bigger than this tree. It isn't a swell budded tree. It is a cotton wood.

Q. Did you measure that fork or the trunk of that tree?

A. I measured the fork.

Q. What did it measure?

A. Ten feet, two and one-half inches.

Q. Which one did you measure—the smallest or the largest fork?

A. The large one.

Q. Immediately above where it forks?

A. Yes, sir.

Q. Did you see in that vicinity any tree that approached that in circumference or diameter?

A. No, sir.

Q. That is the only tree of that kind in that neighborhood?

A. The only one I saw.

Q. And it is a cotton wood tree?

A. Yes, sir.

Q. Did you measure any other trees?

A. Yes, sir; I measured another one.

Q. How much did that measure?

A. I didn't pay any attention to it.

Q. How far was that tree from what was known as the Fortner house?

A. Two or three hundred yards.

Q. Which way is it—up the river or down?

A. Up the river.

Q. Towards the river or from it?

A. It is a little up the river and towards the river from the Fortner house.

Q. How near is that tree from Crutcher Lake?

A. It is right on it.

Q. On which bank?

A. On the east bank, I would call it.

Q. Crutcher Lake is over on that side, and then if Crutcher Lake was west of Old river this tree stands on the Tennessee shore?

A. Yes, sir; it would be; that would be right.

Q. Is that land about where that tree and the house stands about as high as any in what is called Flower island?

A. Yes, sir.

Q. Do you know enough about that island to say whether or not there is about in the middle of it high land, about as high as there is at the tree?

A. There is not much difference between where that house is on down towards Coal Creek.

Q. Is there a clearing, or not, of the house?

A. Yes, sir; there is a clearing. That is what I would call west, or sort of south of the house.

Q. When did you first see that clearing?

A. If this is the Hipp house, I first saw it in 1864.

Q. If it isn't the Hipp place, when did you first see the clearing?

A. Well, if this is not the Hipp place, I never saw the clearing until about five years ago.

Q. Now, Mr. Lawrence, how much cleared land is there to-day?

A. I don't know. A small amount.

Q. How many acres?

A. I don't know hardly how much to say.

Q. Is there ten acres?

A. No, sir; not cleared.

Q. Is there five?

A. No, sir; I don't suppose there are more than three or four acres.

The Court:

How much was there?

A. There was a place growed up in bushes, and I suppose it was four or five acres, and when the question was asked again how much was there that timber was growed up in, in my last deposition I said 12 or 15 acres in 1865; I didn't know, but there was no fences, and when they first asked me I said a little clearing—about 4 or 5 acres, I reckon.

Q. (Mr. Randolph) I will read your answer in this deposition: "In the fall of 1864 I stayed on the island 2 or 3 months at a time; I never noticed the cleared land particularly, but there was some cleared land, about 10 or 15 acres, possibly more, and there was an old house there in a dilapidated condition; looked like it might have been built some 20 or 30 years ago."

Now is that house there now, and isn't it the same house that was there in 1864?

A. No, sir.

Q. You haven't seen the same house that was there in 1864?

A. I say the house that was there in 1864 was a frame house and this house is a log cabin.

Q. You don't know when this last house was put there? The one that is there now, nor who put it up?

A. No, sir; I do not.

Q. Are any of Hipp's people about that place now that you know of?

A. No, sir; there is one of the old darkeys on the land, but there is nobody else that was there in 1864.

Q. Do you know what became of them?

A. No; I never did know what became of them.

Re-examined by Judge Heiskell:

Q. A witness testified the other day that from Crutcher Lake around this backbone, and running down to Hipright pocket, that there has been a bayou all the time and a stream of water running out by that way?

A. No, sir; there is what you call Crutcher Lake, for a good long ways there is no water at all.

Q. No water at all?

A. No, sir.

Q. Is there any timber on it?

A. Yes, sir; there is timber on it.

Q. What size is it? How large is it?

A. Twelve inches on an average.

Judge Flippin further examines the witness:

Q. He said there was a long space between Hepright slough and the Mississippi River, and it was entirely covered with timber?

A. I did state that.

Q. You said something about the rings of a tree indicating the growth of a tree?

A. Yes, sir.

Q. Take a cotton wood tree, for instance, what is the thickness of a ring on a cotton wood tree?

A. They differ from smaller sometimes to larger.

Q. Then it depends upon the location doesn't it?

A. Yes, sir; I think it does, but I don't know.

Q. Tell us the usual thickness of the rings on a cotton wood?

A. The usual thickness is just small.

Q. Well, would it be an inch?

A. Oh, one-eighth of an inch, sometimes, and then it is a half sometimes.

Q. Now do you know, or have you ever heard that these rings are thicker on trees that grow on high ground and away from the river than they are in trees that grow on ground in marshy places and nearer the river?

A. I do not know; I can't say anything about that.

Q. You say there are sometimes as much as a half inch in thickness?

A. They differ in thickness.

Q. Where is that tree situated that you speak of being 13 feet 9 inches in circumference?

A. That is on the bank of Crutcher Lake.

Q. How deep is the water right there at that place?

A. I don't know.

Q. Don't they fish there?

A. Yes, sir; they fish there.

Q. You spoke to Judge Heiskell of that backbone, and you stated that there were only a few acres of that so far as you knew?

A. It is a very small place.

Q. How much higher is that than the other land connected with it?

A. It is, I suppose, two or three feet higher than the surrounding country.

Q. The backbone is immediately on Crutcher Lake, is it not?

A. Yes, sir.

Q. On which side of Crutcher Lake?

A. On the east side, I would call it.

The Court: I understand him if Crutcher Lake was the Mississippi river, it would be on the Tennessee side?

Judge Heiskell: Mr. Randolph asked you if there hadn't been considerable accretions made to the land?

A. Yes.

Judge Flippin, continuing:

Q. Have you been on the east side of this land in controversy, not far from the bank of Old River? From Crutcher Lake going eastward, does the land go down or is it higher?

A. It lays pretty near even when you get to what you call Old River; then it goes down.

Q. Do you know anything about the water in Old River?

A. Yes, sir.

Q. What do you know about the water standing in the bed of Old River, on the eastern side?

A. I was right there about five or six years ago.

Q. Well, what did you see then?

A. A good big piece of water.

Q. What season of the year was it?

A. In the dry season—in the fall.

Q. Ordinarily it would have been lower at that season wouldn't it, than it would have been in the spring of the year?

A. Yes, sir; that was our dry season.

Q. And there was a good long stream of water lying along the bed of Old River?

A. Yes, sir.

Q. Did that water approach to the Fortner house?

A. Yes, sir; it went pretty near to it. Now and then

there would be breaks in the water, and where it would commence there would be deep holes of water.

Q. Deep holes of water?

A. Yes, sir.

Q. In high water it would run all along there, wouldn't it and steamboats could get there?

A. No, sir; they couldn't get in there.

Q. (Judge Heiskell): What is called the original Tennessee shore?

A. Old River.

Q. East of Old River?

A. Yes, sir; on the east bank I would call it.

Q. What is the character of the East Tennessee shore?

A. From five to six and eight and ten feet of bluff.

Q. Now, the timber on that Tennessee shore—the original Tennessee shore—what is the character of that compared to Flower Island?

A. Well, on Flower Island there are willows and small timber and cottonwood, but what I call the Tennessee shore where the Old River was, it has bigger timber, like sycamore.

Q. On the bank of the river?

A. That is so, until you get up about to this high point; you know on the bank of the river it is bigger timber.

Q. Mr. Randolph asked you whether there hadn't been large accretions west, there have been, haven't there?

A. Yes, sir.

Q. That was done since you have been there?

A. Yes, sir.

Q. I understand you to say that on that point of the island in 1864 the Mississippi River was running where Crutcher Lake is?

A. Yes, sir.

Q. From this high point the wood you loaded was cut?

A. Yes, sir.

Q. And you loaded from that high point into the Mississippi river?

A. Yes, sir.

Q. You say you measured also one of the forks of this tree the other day?

A. Yes, sir—that one on the backbone.

Q. It measured 10 feet 2 1-2 inches?

A. Yes, sir.

Q. How large were the other branches?

A. They were smaller.

Q. You didn't measure them?

A. No, sir.

Q. How large, in your judgment, were they?

A. Twelve or fourteen inches in diameter; maybe more than that.

Q. A foot in diameter, would you say?

A. Yes, sir; more than that; I didn't pay much attention to it.

Q. Mr. Randolph asked you where the Hipp house was with reference to the Mississippi river; you answered two or three hundred yards east of the Tennessee shore?

A. Yes, sir; I answered that.

Q. Where was the Fortner house with reference to Crutcher Lake?

A. It is a little down, I would call it.

Q. Down and a little back, isn't it. Now, along there in 1864 from Craighead point could you see the land of this Flower Island?

A. Yes, sir; I could come right out from where I lived from my house. My house was down on a point, and there was a big sand bar lay right out from Craighead point towards Fort Pillow, and it was just as plain as you see that house over there. I could see it at any time; it was in plain view when you come out there, and there was no timber between the house and the bank—it was all cut out between the house and the Mississippi river.

Q. I want to ask you the witness whether there wasn't a tradition in the country that—

Question calling for traditions objected to. Objection sustained.

Re-cross examined by Mr. Randolph:

Q. The bar that you say was in front of Craighead Point in 1864 or 1865 is there now, isn't it?

A. I reckon it is; I haven't been on that place. They tell me they are farming on it now.

Q. Farming on what was then a bar?

A. Yes, sir.

Q. And you could see the Hipp house from your home, and there wasn't any obstruction?

A. There was a strip of cottonwood growed along the bank.

Q. But there wasn't any obstruction between the river and the house that you knew of?

A. No.

Q. Are there not trees growing along the bank of the river now that were not there then?

A. Yes, sir.

Re-examined by Judge Heiskell:

Q. These cottonwoods have grown up since?

A. Yes, sir.

Q. What is the size of those cottonwoods?

A. Twelve inches, or more, in circumference.

Q. In diameter, you mean?

A. Yes, sir.

Q. The trees that grew up since 1864 towards the Arkansas shore?

A. Yes, sir.

Q. (Juror): You say in 1864 you went from the island to the Tennessee shore at one time?

A. Yes, sir.

Q. How did you go?

A. On horseback.

Q. On dry land?

A. On a sand bar—yes, sir.

Q. A sand bar between the main land and the Tennessee shore?

A. Yes, sir.

Q. You rode horseback all the way?

A. Yes, sir.

Q. Then you crossed this sand bar?

A. Yes, sir; I crossed the sand bar.

Q. Old River, in 1864, ran up from what is now called Coal Creek above where the Hipp house then stood?

A. Yes, sir; I went out above Crutcher Lake.

Q. How far is Crutcher Lake from Plum Point?

A. It is four or five miles.

Q. The land at Plum Point is higher than down here; that is where you went out?

A. Below Plum Point.

Q. That land up there is higher than it was at the Tennessee shore?

A. Yes, sir.

Q. Where you went out was some considerable distance above where Crutcher Lake is now and you had to cross the sand bar to get to the Tennessee shore?

A. Yes, sir.

Q. Was that the bed of Old River, or not?

A. Of course, I went out on this bar what seemed only the original Flower Island, and I was sort of going to the head of it and after that out towards the Tennessee shore.

Q. Did it slope towards the Tennessee shore?

A. No, sir; it went about level.

Further examined by Mr. Randolph:

Q. Were trees growing on what you call the sand bar?

A. Some places there were trees and some places nothing but bushes.

Q. Trees grew on it though?

A. Yes, sir; little trees.

Q. If I understand you right, you didn't go on the Tennessee shore below this Fortner house?

A. No, sir; I went out above it.

Q. How far above it?

A. Well, I couldn't have gotten out on it.

Q. You didn't try did you?

A. No, sir.

Q. The Old River was there wasn't it?

A. Yes, sir.

Q. What was the width of Old River in 1864?

A. I couldn't say. I wasn't down it except right across there that one place.

Q. (By Juror): Do you know how many rings in a tree without cutting it to see?

A. No, sir.

Q. You would have to cut it would you?

A. Yes, sir.

Q. (Judge Flippin): Do you know where Yankee Bar is?

A. Yes, sir.

Q. Is this McKellar tract above what you call Yankee Bar?

A. I can't tell.

Q. Yankee Bar is now connected with the Tennessee shore?

A. I reckon it is.

Q. Don't you know whether it is or not?

A. I couldn't say.

Q. What is the extent of the accretions to the Tennessee shore towards Crutcher Lake?

A. It must be a mile. I couldn't say; it is all growed up with willows and bushes, and you can't tell much about the distance.

Q. What was the extent of the accretion to the Tennessee shore west of Crutcher Lake?

A. I couldn't say; it is a good piece.

Q. Half a mile?

A. Yes, sir; about half a mile.

Q. How far did they extend towards Plum Point up the river?

A. It gets narrower towards the head, so I can't say.

Witness excused.

6. John A. Lovewell, witness for defendant Ayres, was then examined as follows:

Examination by Judge Heiskell:

Q. What is your name?

A. John A. Lovewell.

Q. Are you the John A. Lovewell that gave a deed to Mr. Ayres?

A. Yes, sir; to Flower Island.

Q. Fractional sections 17, 18, 19 and 20, 12 12? Is that your signature?

A. Yes, sir.

Q. That is the original deed, is it?

A. Yes, sir.

Q. Now, Mr. Lovewell, that deed proposed to convey to Mr. Ayres fractional sections 17, 18, 19 and 20, township 12 range 12 together with all the accretions thereto attached or belonging thereto?

A. Yes, sir; the deed I made to Ayres did that.

Q. Is that Flower Island?

A. Yes, sir.

Q. The land here in dispute?

A. Yes, sir.

Mr. Randolph objected.

Objection sustained.

Q. Where is fractional sections 17, 18, 19 and 20?

A. It lays a little west of north from the mouth of Coal Creek.

Q. What is it called?

A. It is called Flower Island.

Q. What has it been called so far as your memory extends?

A. I have known it ever since 1863 and it was always called Flower Island.

Q. Are you acquainted with Flower Island?

A. I never was there but twice in my life.

The Court:

Q. How far did you say it was?

A. I didn't state the distance, it lies north of west and the accretions extend down from Coal Creek and makes Coal Creek a good further from the main shore than it was before.

Q. You say you went down there?

A. Yes, sir; I went down there twice in my life to see what it was. I had to go over the accretions of land and what is called Flower Island about a half of a mile before I could strike the Old River. That was in 1883.

(Judge Flippin):

Q. Did you say you had known it since 1883?

A. I bought it in 1883 but had known it since 1863.

(Judge Heiskell):

Q. Mr. Lovewell, at the time you bought this land state what examination, if any, you made of the records with regard to it?

Objected to by Mr. Randolph.

Objection sustained.

Q. State if the land is platted as a part of the state of Arkansas?

Objected to by Mr. Randolph.

Objection sustained.

Q. There is a plat?

Witness is shown the plat.

It is marked N. W. Ex. 1. See plat p. 404, also p. 352.

Q. Now, Mr. Lovewell, do you know what this is?

A. Yes, sir, that is a plat of Mississippi county, Arkansas, by township and range.

Q. Where did it come from?

A. From Osceola, it belongs in the clerk's office.

Q. In the clerk's office?

A. Yes, I have handled it a thousand times there in the clerk's office, and I know it is a plat of Mississippi county, Arkansas, by township and range.

Q. What does that plat show with reference to Arkansas, if anything.

Mr. Randolph objected to Judge Heiskell asking the witness what the plat shows.

Objection sustained.

Q. Then I will show the plat to the jury.

Objected to by Mr. Randolph.

1. No law of the state of Arkansas authorized the keeping of any such map or plat in the clerk's office.

2. These surveys of township, range, sections, and parts of sections are made in the authority of the United States by its officers appointed by that authority and all must be returned to the office of the general land office, and only the record can be used here to show the evidence is there.

3. It is not produced by the custodian of the records, it is produced out of the state of Arkansas and there is nothing more than the declaration of a witness to show that there is a record of the state of Arkansas.

4. Nothing in that map or plat can be used as evidence to establish any proof.

Objection overruled.

(Judge Heiskell continues):

Q. What public office have you held in the state of Arkansas, Mr. Lovewell?

A. I was first elected constable two years afterwards assessor of the county and eight years after that I was elected sheriff of the county.

Q. This comes from what?

A. From the clerk's office in Mississippi county.

Q. State what land that covers?

A. It covers Sections 17, 18, 19 and 20 and found in the entry book that corresponds to this and this shows the exact number of acres in each part of that entry.

Q. What does that represent, if you know?

Mr. Randolph: If it please the court, it is there to show for itself.

The Court: This witness may testify to anything he knows about that land, personally.

Q. What do you know about those sections 17, 18, 19 and 20?

A. Well, I know I have known them actually since 1863 I went to Osceola in 1863, January, 1863, and during that year I made several trips to Ft. Pillow and we made most of the trips by way of the river and I know that this Flower Island country was there at that time, and it was pointed out by the people who knowed the country there since the war.

Q. What did you know about this particular plat as relating to the land that is covered by that plat? Is that Flower Island as platted by the authorities in Mississippi county?

Mr. Randolph objects, on the ground that it is irrelevant and incompetent.

Objection sustained.

Q. What was that property known by at the time this plat was made?

A. I couldn't answer only by what I was told and what I heard.

Mr. Randolph: That is why I objected, and the objection was sustained.

Q. Where does this Flower Island now lie with regard to Troy?

A. Troy means the political township.

Q. Where does that lie with regard to the present, Flower Island?

A. On the main Arkansas land.

Q. Right opposite?

A. Yes, sir.

Q. Where did Troy lie at the time this plat was made? Or when you first knew this plat?

A. It was named for a man by the name of Troy and the township has been there ever since I have been there.

Q. Where does Flower Island lie?

A. Right on the river—on the north side of the channel of the river now.

Q. This map purports to be plat of Sections 17, 18, 19 and 20; where are those sections?

A. They are all on the bank of the river.

Q. On the north bank of the channel of the river now?

A. Yes, sir.

Q. Well, what are they?

A. It is Flower Island.

Q. Well, is that the land in controversy?

Mr. Randolph objected. Objection sustained.

Q. State what book this is?

A. Entry book of all the lands of Mississippi county. It shows who they were entered by and when.

Q. Where did you get this book?

A. I didn't bring it here.

Q. You have seen it before, have you?

A. Yes, sir; many a time.

Q. Do you know this book?

A. Yes, sir.

Q. How do you know it?

A. I know it because I have handled it a thousand times.

Q. What did your official position require you to do with it?

A. It didn't require anything.

Q. You were first constable and then assessor and then sheriff?

A. Yes, sir.

Q. Didn't the assessor have to assess the land?

A. Yes, sir. The only time I ever used this book was when I was assessor for St. Francis levee, and I found out how many acres in a certain piece of ground that I had to examine for taxes.

Q. What does that book show with regard to these sections?

A. It shows them fractionally. Fractional sections of 17, 18, 19 and 20 of Township 12, Range 12.

Mr. Randolph objects. Objection overruled.

Q. Just find out what that book shows and let it speak for itself. These fractional sections entered in this book, are they fractional sections on the plat?

Objected to as incompetent and irrelevant, and the objection was overruled.

Q. Mr. Lovewell, state what controversy, if any, you ever had with Mr. Marley in regard to this Flower Island.

Mr. Randolph objects as irrelevant.

Judge Heiskell then stated what he proposed to prove with regard to this controversy, and the settlement of same as follows:

I propose to show by this witness that shortly after he, the witness, bought the island he sold the stand of timber on it, or part of it, to a man by the name of Petty; that after Petty had cut some of the timber some one informed him that Mr. J. C. Marley had claimed the price of that timber because he claimed the island, and that Petty told him he had required a bond from Marley before he would pay Marley the money. The price of the timber already cut amounted to $80.00; that this was all done without the knowledge or consent of the witness; and that as soon as he sold it he informed him, Marley, that he had no interest in the island, and that if he would come to Osceola he would show him the records there that the island belongs to him, Lovewell, and belonged to him by his purchase; that Marley declined to do that, but the two arranged a meeting between them at Ft. Pillow; that the witness went to Ft. Pillow on the day appointed with his attorney, and they discussed the various claims of the parties, and that Mr. Marley finally said as a final settlement of the thing: "Mr. Lovewell, if you will let me retain the $80.00 I will give up any claim I may have to Flower Island from this time forth"; that Mr. Lovewell agreed to that, when he sold it to Mr. Ayres he asked about the title to Flower Island, and he told Ayres the sources of his title and said: "I have never had any difficulty or trouble about it except with Mr. Marley," and then he went on and stated the trouble and the settlement of it as before set forth, and thereupon Ayres bought the island. I claim that this is an estoppel on Marley, and of course on the plaintiff, Polsdorfer, who is a privy of Marley.

On the same subject Ayres then offered the deposition of William Randall, which is as follows:

Q. 1. State your name, age, residence and occupation.

A. My name is William Randall; age, 52 years; residence, Mississippi County, Ark.; am a farmer.

Q. 2. Are you acquainted with the parties to this suit? If so, how long have you known them?

A. I know J. C. Marley when I see him; and know Mr. Ed Ayres; have known him for 30 years. I don't know Mr. Polsdorfer.

Q. 3. State when and where you last saw J. C. Marley, one of the parties to this suit?

A. I last saw him at Ft. Pillow, Lauderdale County, Tennessee, some time in the year 1883 or 1884.

Q. 4. How come you to go to Ft. Pillow at that time and with whom did you go?

A. I was employed as a skiffman to carry John A. Lovewell and J. O. Blackwood to Ft. Pillow to meet Mr. J. C. Marley; they went there for the purpose of settling the controversy between John A. Lovewell and J. C. Marley about Flour Island, and they met there at that time and each exhibited their title papers to Flour Island. It seems that John A. Lovewell, previous to this time, sold to O. E. Petty a lot of timber on this island, and J. C. Marley, after Mr. Petty had cut the timber, claimed the stumpage, and Mr. Petty made Mr. Marley give him an indemnifying bond before he would pay him the stumpage, which Marley did, and collected for the timber $80.00. Lovewell claimed this stumpage and insisted on Marley paying it over to him. And after wrangling for 3 or 4 hours they finally settled the controversy between them by J. C. Marley making the proposition to Mr. Lovewell for he, (Marley), to retain the $80.00 that he had already collected from O. E. Petty, as stumpage for timber cut on Flour Island, and that he (Marley) would relinquish all his right, title, interest and claim to Flour Island to John A. Lovewell, who accepted the proposition, and in this way the matter was settled between Marley and Lovewell.

Cross Examination.

Q. 1. Did Mr. Marley execute and deliver to John A. Lovewell any paper or writing to the effect that he would relinquish all of his right to said Lovewell in Flour Island?

A. I didn't see him give Mr. Lovewell any paper, but if my memory served me right I think he agreed to give him one to that effect; they were wrangling a long time about the matter, and when they finally agreed to settle it, my recollection is that Marley was to keep the $80.00 that he had gotten from Petty, and that he was to desist from any further claim to the timber or land on Flour Island.

Q. 2. Do you know what title Lovewell had to this land?

A. I don't know, but Blackwood was along and said they had the papers to show that the land had been taken up in Arkansas by Lovewell; and further deponent saith not.

his
William X Randall.
mark.

Properly certified and sworn to.

Mr. Randolph objected (1) because if it was a contract conveying land it must be in writing, and the writing must be introduced as evidence under the rules; (2) because Polsdorfer is not a party to it, is not affected by it, and not a matter of which he had any notice and not a matter which had been put upon the records anywhere.

Objection sustained, and defendant Ayres excepted.

Cross-examined by Mr. Randolph:

Q. Are you a surveyor?

A. Yes.

Q. Do you ever survey any of the public lands of the United States?

A. No, sir.

Q. Do you know anything about this original survey?

A. Only what the records show.

Q. That is all? You never run any of the lines, did you?

A. No, sir.

Q. Do you really know where Secs. 17, 18, 19 and 20 are?

A. Yes, sir, they are on Flower Island.

Q. How do you know it? Did you ever run a line of the section on the Arkansas shore?

A. No, sir.

Q. Or on the Tennessee shore?

A. No, sir.

Q. Did you ever see an island on the Mississippi River like this one on this map?

A. You say did I ever see it?

Q. Yes, down the river?

A. You mean in that shape?

Q. Yes.

A. With the river running around it in this way?

Q. Hasn't that been filling up towards the Arkansas shore since you knew it?

A. No, sir, it has been making towards the Arkansas shore.

Q. Hasn't that land been extending there since you knew it?

A. I think it has caved away as much as it has made.

Q. You never saw it until 1863?

A. No, sir.

Q. Where did you live before that time?

A. In Arkansas.

Q. In what part of Arkansas?

A. In Craighead County.

Q. Not on that land?

A. No, sir.

Q. When you got there the main channel of the Mississippi was on the east side of this land?

A. Yes, sir.

Q. You never saw steamboats run east of this land?

A. No, sir, I never did.

Q. Did you obtain these records from Mississippi County?

A. I didn't bring them here.

Q. Do you know who brought them here?

A. Yes, sir, Mr. Ayres' son. I wrote and telegraphed to county court clerk and asked him to send them by Ayres' son.

Q. Are these records complete, or only partially complete as compared with the map of the county? Have you any map except this one?

A. No, sir.

Q. Is there any record in that office?

A. I have a map in my house that shows that.

Q. Is there any record in that office to show the balance of the sections except this one here?

A. Yes, sir, there is a map in the Court House that shows them.

Q. Is there any public record showing these sections I have just mentioned?

A. Yes, sir, just like that other.

Q. What maps are they?

A. Maps of Mississippi County.

Q. Who made them?

A. I don't know.

Q. How many maps are there?

A. I don't know. The clerk could have any number of them made.

Q. Do you know who made this map?

A. No, sir, it was made before I went there.

Q. Was that map sent here this week?

A. It has been here several days.

Q. You were the assessor in that county; did you ever assess this land, or collect any taxes for it?

A. Yes, sir, in 1888. Well, I collected taxes four years ago while I was sheriff, and four years under Mr. Haskins, and in 1886 and in 1889.

Q. Did you ever know of any taxes collected before 1886 on this land?

A. Yes, sir.

Q. Who collected them?

A. W. B. Haskins, sheriff of the county.

Q. Who did he collect from?

A. Well, I bought it in 1883.

Q. Did you pay taxes on it?

A. Yes, sir.

Q. What year?

A. I paid taxes for it in 1883 and 1884, and put it on the tax books in the county clerk's office.

Q. In 1882 did you pay taxes?

A. That was the first time—yes, sir—since the war.

Q. The first time you knew of it ever being taxed was in 1882?

A. Yes, sir.

Q. You bought it at a sheriff's sale for back taxes?

A. Yes, sir.

Q. For the back taxes of 1881?

A. Yes, sir. There was a good deal of land sold—about 100 tracts of land, and there was a good many left off of the assessor's books, and some had to be put off and some of them backed out. The sheriff had to collect for them and it was the bringing of a suit to collect the taxes, and they were sold like all other lands are sold.

Q. Wasn't the suit brought in the Chancery Court?

The Court: In 1882, when it was put in the tax books for the first time since the war, wasn't it?

A. Yes, sir, and it was assessed as unknown land.

Q. The original owners were not known, and it was put on as unknown land?

A. Yes, sir.

Q. Didn't you buy at a sale when McVeigh was made the seller?

A. No, sir.

Q. Was it Barchus?

A. He was commissioner of the court.

Q. McVeigh was a substitute in his place?

A. Yes, sir. Mr. Barchus failed to make his report in the time prescribed by law, and he was removed.

Q. Then that purchase was your first source of title?

A. Yes, sir.

Q. And the only one?

A. Yes, sir.

Cross-examined by Judge Flippin:

Q. I have only one question to ask you; you say you first knew this land in 1863; how old are you—51?

A. Yes, sir; I will be 52 the 21st of March.

Q. (Mr. Randolph:) Then how old were you in 1863?

A. In 1863 I was about 14 years old.

Witness excused.

The deposition of E. C. Cooper was then read as follows:

Circuit Court of the United States, Western District of Tennessee.

John H. Polsdorfer and wife
vs.
J. C. Marley et al. } No. 3491.

7. Depositions of E. C. Cooper and others. Filed May 31, 1899.

John H. Polsdorfer and wife:

Take notice that on the 23d day of May, 1899, beginning within legal hours, at the Court House in Osceola, Ark., before T. A. Matthews, a notary public, I will proceed to take the depositions of J. D. Driver, Charles Bowen, William Hip, David Lawrence, E. C. Cooper and others to be read as evidence when taken in the trial of the above cause by the defendant, E. M. Ayres. If the taking of said depositions are not finished on said 23d day of May, they will be proceeded with from day to day until finished. This May 2, 1899.

E. M. Ayres,
By C. W. Heiskell, Atty.

Service acknowledged for plaintiff, May 2d, 1899.
Randolph & Randolph, Attys.

Owing to the incapacity of T. A. Matthews, the officer authorized in above notice, to take these depositions, it is agreed by plaintiffs that J. E. Thomason, notary public, may be substituted in place of said Matthews.

Osceola, Ark., May 23|99.

S. S. Semmes,
Atty. for Plaintiffs.
G. W. Thomason,
Atty. for Defendant.

The depositions of J. D. Driver, Chas. Bowen, William Hip, David Lawrence and E. C. Cooper, taken by consent of parties before J. E. Thomason, notary public within and for the County of Mississippi and State of Arkansas,

to be read as evidence in behalf of the defendant, E. M. Ayres, in a suit now pending in the United States Circuit Court at Memphis, Shelby County, Tennessee, wherein John H. Polsdorfer and wife are plaintiffs and J. C. Marley et al., are defendants.

E. C. Cooper, being first duly sworn, deposeth as follows, to wit:

Q. 1. State your name, age, residence and occupation.

A. E. C. Cooper; soon be sixty-six years of age; Lauderdale County, Tenn., is my home; farmer by occupation.

Q. 2. Are you acquainted with the parties to this suit, Mr. Cooper, if so, how long have you known them?

A. I am acquainted with Mr. Price and Mr. Marley very well, and I am slightly acquainted with Mr. Polsdorfer and Mr. Ayres, I have known Mr. Price and Mr. Marley a long while. I have known the others for only a short while.

Q. 3. State whether or not you are acquainted with an island in the Mississippi River situated below the town of Osceola, Arkansas, known as Flower Island. If you say you are, state how long you have known it.

A. Yes. I have known it since the winter of 1854.

Q. 4. State whether or not that during your acquaintance with this island you frequently had occasion to go upon it and observe its condition as to improvement, character and growth of timber standing thereon, the number of acres of original land on the island at the time you first knew it in 1854?

A. When I first knew it in 1854 there was a good, big farm on it. I never paid much attention to the timber, but most of the growth seems to be cotton wood. The size of the timber varied from twenty inches to three feet in diameter. I don't know how many acres there was in the original island, but there was a large place. I suppose there was a thousand acres of the original island.

Q. 5. State whether or not since your first acquaintance with this island in 1854, you have had occasion to visit the same and to observe its condition as to improvements, the growth of the timber, the different sizes of the timber upon the island, caving condition of the banks, the formation of accretion thereto, if any, and state also how often you have been upon this island from your first acquaintance to the present time?

A. Ever since I first knew it I have been on it nearly every year; paddling around it in a canoe and hunting on it. There was a good big farm on it from 1854 to 1862,

with house on it up to 1863. As to the growth of the timber, on the south side of the island was the largest timber. The land on the island sloped in the direction of the Tennessee shore, the land being much higher on the southwest side, which was near the Arkansas shore, than it was on the northeast side, which was towards the Tennessee shore. The timber after you got off of the main body of the island was smaller. The banks on the southwest side were of a caving disposition ever since I first knew it, but never caved much until 1862, and that was the time it commenced caving considerably.

Q. 6. State, as near as you can remember, the number of acres cleared land you observed on this island in 1862?

A. My recollection is that there might have been fifty or sixty acres of cleared land on this island in 1862; there might have been more.

Q. 7. State whether or not you had occasion frequently to go over the cleared part of this island from 1854 to 1862. You observed any standing or fallen timber on this cleared land. If there was stumps standing on it. State the diameter of stumps, the height and diameter of the trees on the cleared land?

A. I went over it but did not notice it particularly. I don't remember whether there was trees standing on the cleared land or not. I don't remember noticing any stumps.

Q. 8. By what name, if any, was the farm on this island known in 1854, and in whose possession was the same?

A. Known as the Barns place. I suppose it was in Barns' possession.

Q. 9. How far was this cleared land from 1854 to 1862 from the main bank of the Tennessee shore?

A. I would suppose from the mouth of Forked Lake to the cleared land would be about two miles. I am just guessing at it. I suppose this to be the nearest point to the Tennessee shore.

Q. 10. When were you last on Flower island?

A. I was last on the island on the 25th day of December, 1898.

Q. 11. From your long acquaintance with this island, your frequent visits to the same during that time, please state whether or not at the time you last visited this island on the 25th day of December, 1898, you observed any part of the original island that you saw in 1854, when you first visited it; if you say there is, state as near as you can remember, the number of acres at that time of the original island?

A. I did. There was in December, 1898, a backbone of 1. three or four acres of the original island across the top of the backbone. I suppose it was 20 or 30 steps broad, and about 300 yards long. This backbone of original island is right at the foot of Crutcher Lake.

Q. 12. What was the nature and character of the soil and the timber, if any, growing thereon, between Flower island proper and the Tennessee shore from 1854 to 1862; also state whether there was any running water, pools or lakes of water at that time between Flower island and the Tennessee shore; if running water, how did the same run; if lakes or pools, the size and extent of the same?

A. The soil was mixed a good deal with sand, principally sand, and was the bed of the Old river; it grew up in willows and small cotton wood. From 1854 to 1862 in high water it would run around there, it would run through the little ravines or cuts up and down it; at an ordinary stage of water there was no running water around there; there was pools of water and lakes between the island and the Tennessee shore, at the banks of the Tennessee side. The deep water was at the banks of the Tennessee side of the river. Some of these pools and lakes hold water the whole year.

Q. 13. State, if you remember from 1854 to 1862, how high the banks of the Tennessee shore opposite Flower island stood above the bed of the old channel of the Mississippi river, and also state at that time whether the banks were slanting or perpendicular?

A. During that time I can not remember as the old channel was covered with water, and I don't know how deep the water was. The banks at that time were generally perpendicular, and are perpendicular now.

Q. 14. How many acres of land were there on this island in 1862?

A. I couldn't tell you, but there was a fine lot of it.

Q. 15. About how many acres are there on the island now?

A. I don't know, there may be four or five thousand acres, I guess.

Q. 16. State whether or not since you first saw this island, in 1854, there had been any land accreted to or formed on the original island; if you say there has, state about how much and in what direction the newly made land or accretion extended, and state whether or not the newly made land first formed on the island and extended out in the direction of the Tennessee shore and attached itself to the island?

A. The old island that is left there, there has been

lots formed around it. All the land there is there is formed around it. Now here we will say is the backbone; well it is made in every direction from this backbone. I mean it went around it, or surrounds it; well it formed from the island towards the Tennessee shore, and here was no formation out towards the island, from the Tennessee shore; oh, no, there is none till this day.

Q. 17. You have stated in this deposition that on December 25th, 1898, you were last on this island that you then observed three or four acres of the original island, will you state the marks by which you were enabled to distinguish the land on the old original island from the newly formed or accretion land attached thereto?

A. Well, it is higher, the old original land.

Q. 18. Then you mean to say from your knowledge of this island you are prepared to state that from the height of the back-bone which stands much higher than the newly formed, and your familiarity with the topography of the land on the original island, that this three or four acres that you observed in December, 1898, is a part of the island, as it existed in 1854, when you first saw it?

A. Yes, sir, that is part of it. This back-bone is now on the bank of what is known as Crutcher Lake.

Q. 19. Where is Crutcher Lake located, and how long has the lake been there?

A. Crutcher Lake is nothing more than the bed of Old River from the Dave Friend place down to the foot of Flower Island, and lies between Flower Island and the Tennessee shore. I mean so much of it as has not been filled in. A part of the lake was there in 1854, when I first knew it. I don't know how long it had been there before that time.

Q. 20. What is the extent of this lake?

A. I can't tell you; this lake is about two miles long and about two hundred and fifty yards wide in the widest part. I have been fishing in the lake for the last two or three years.

Q. 21. What has been the usual depth of the water in this lake since you have known it up to the present time?

A. Well, it runs from one foot deep to eight feet deep; the deepest I have found was eight feet, and the water stands in this lake the year round, the deepest water is eight feet during low water.

Q. 22. State whether or not Crutcher's Lake is formed in the old channel of the Mississippi River and lies east of what is known as Flower Island, and between said island and the main banks of the Tennessee shore.

A. There is a part of this lake formed in the old chan-

nel of the Mississippi River; part of it where it caved off. A part of this lake extends down below the head of old original Flower Island, when I first knew it.

Q. 23. How far is it from the head of Flower Island going down the old channel of the Mississippi River to where the same empties into the main river, and what is the condition of that part of the old channel from the head of Flower Island to its mouth as to timber and water, and also state the height of the banks on the Tennessee shore along the line from Flower Island to the mouth of the old channel, above the bed of Old River; also state whether the banks on the Tennessee shore are perpendicular or slanting; state how it is?

A. About four miles from the head of Flower Island going down the old channel of the Mississippi River to where it empties into the main river. Right in the old channel it is mostly willow, at the upper end it is mostly cotton wood, some mulberry and box elder. The lower part of it which is grown up in willows the size of which is from riding switches up to fifteen inches in diameter. This willow growth extends up from the mouth of Old River three or four miles, and next to the Tennessee shore and between the Tennessee shore and Flower Island, at the extreme upper end is mulberry, cotton wood and box elder. At the upper end there is some cotton wood that I suppose is two feet in diameter, from that on down. The banks on the Tennessee shore will go from three feet to eight feet above the bed of the old channel of the Mississippi River at the present time. The banks are mostly perpendicular on the Tennessee shore. The water stands in places next to the Tennessee shore, then around other places are dry—the head of it is dry after the water goes down, because it is filled in.

Q. 24. Do you know of a house built on the island several years ago, by defendant, E. M. Ayres, and known as the Faulkner House?

A. I knew there was a house built there called by me the Polsdorfer House, and by other the Faulkner House.

Q. 25. How far is this house from the main bank of the Tennessee shore?

A. I would suppose it to be a mile or more from the nearest point on the Tennessee shore.

Q. 26. When you first visited this island in 1854 what object did you have in view? How long did you stay on it?

A. I was on my way home. I stayed there 2 or 3 hours. I didn't observe the growth of the timber at that time, but I did later in the summer of that year, when I went

there to take a contract from Mr. Barnes to cut cord wood. I found mostly cotton wood, the average size of which was about three feet in diameter, some hackberry, etc.

Cross-examination by the defendant, Polsdorfer:

Q. 1. You have stated in your direct examination that of the original Flower Island as it stood in 1854 there remained when you last saw it in the winter of 1898 only a back-bone or strip about 300 yards long and twenty or thirty steps broad across the top and composing about three or four acres; how did the caving of this island take place so as to leave only this back-bone or strip?

A. The caving commenced at the southwest part of the island, and extended all the way around the island except between the back-bone and the Tennessee shore. It never caved any on the southeast side.

Q. 2. How far is this back-bone or strip from the head of the original island as you knew it in 1854?

A. I suppose it is about a mile.

Q. 3. Is not this back-bone just west of what is known as the Faulkner or Polsdorfer House, and if so, how far distant?

A. The foot of the back-bone is a southwest course from the house, and about three hundred yards distant.

Q. 4. What is the nature of the land superficially, between this back-bone and the land upon which the Polsdorfer Houses stand?

A. Between this backbone and the land upon which the Polsdorfer houses stand there is a sway of about two or three feet. This sway is a kind of willow slash extending from the head of the backbone and runs into the Hell-fite pocket and is about two hundred yards wide.

Q. 5. What is the relative height of the land upon which the Polsdorfer houses stand with the height of this backbone?

A. I suppose the height is about the same, there can't be a great deal of difference.

Q. 6. Now, on going from the Polsdorfer houses to the main land on the Tennessee shore, what is the condition of the intervening land as to height and what is the depression at the bank on the Tennessee side?

A. In going back from the Polsdorfer houses the land seems to be about the same height for some distance, but when you get within six or seven hundred yards of the Tennessee shore the land slopes, and makes a depression at the Tennessee shore, and there is pools or ponds of water along the Tennessee shore, but by going up to-

ward the Crutcher field there is a wagon road running across Flower Island to the main Tennessee shore, where it strikes what is called the line road, and this road can be traveled at all seasons of the year except when the river is up. I mean from Flour Island out to the Tennessee shore, and there is very little depression in going up to the Tennessee shore.

Q. 7. Did I understand you to say in your direct examination that this backbone of island which was all that remained of the original Flour Island in 1898, was on the northeast bank of Crutcher Lake and near the foot of Crutcher Lake?

A. Yes, sir; that is my recollection.

Q. 8. Is that the bank of Crutcher Lake which is nearest to the Tennessee shore?

A. Yes.

Q. 9. You have also stated I believe that Crutcher Lake was a part of the old river in next to the Tennessee shore? Is that correct?

A. A part of Crutcher is the old bed of the river and part is formed from the caving of the island.

Q. 10. Now, is it not a fact that a part of the bank of Crutcher Lake is the bank of the original Tennessee shore?

A. All of the west end of the bank of Crutcher Lake is what you might call the Tennessee shore.

Q. 11. Please state exactly how you locate in your mind the fact that this backbone of land that you speak of as being there in 1898 is part of the original Flour Island?

A. I was up there in 1867, this backbone then, at that time, was considerably higher than any other land around it, this was during an overflow and this was the only land that was out of water.

Q. 12. Then that is your only means of judging that this backbone is a part of the original island, is it?

A. Well, I had been there the spring before and I had been there the fall before, and when I came up there to it I saw that it was about all gone but this little strip or backbone.

Q. 13. Is it not a fact that in a high stage of water or in what is called an overflow the whole of that county including the backbone went under water?

A. In 1867 we had a big overflow, the whole of that country was under water excepting a high spot or two on the south end of what is known as the Howard farm, there there was a little lump out of water on what is known as the Lumpkin land, this backbone was under at that time.

Q. 14. Has this Island caved off; it made a kind of a straight bank, did it not?

A. Yes, sir.

Q. 15. Is it not a fact that this island did not commence to cave badly until about 1862, when the gunboats shelled Ft. Pillow during the war?

A. From 1854 up to 1862 it didn't cave, but very little, then it commenced to cave badly, about the time of the gunboat fight.

Q. 16. Didn't they sink a gunboat or some other craft off the island towards the Arkansas shore which started the formation of what is known as Yankee Bar?

A. They sank an old barge which formed a lump, which caused Yankee Bar.

Q. 17. Now, is it not a fact that when Yankee Bar commenced to form that it was completely separated from Flour Island by the river?

A. It was.

Q. 18. Now, is it not a fact that as Flour Island caved away Yankee Bar kept growing and moving over to Flour Island until it finally caught up with Flour Island?

A. Yes, sir; that is a fact, it joined onto the foot of it.

Q. 19. It is a fact then, is it not, that a large portion of what is now Flour Island on the Arkansas side of it was originally formed as Yankee Bar?

A. Yes, just as I stated as Flour Island caved away Yankee Bar kept following it until it caught up with it.

Q. 20. Now, is it not a fact that but very little of what is now Flour Island on the side of it next to the Arkansas shore was formed by the land making up against this backbone and that really pretty much all of Flour Island this side of that backbone was what was originally Yankee Bar?

A. That is a fact, but there is now a cut between the two places.

Q. 21. Is it not a fact that after all those formations took place and the main channel of the river came this side of Flour Island that except in high water, the water in between Flour Island and the Tennessee shore, because slack or dead by reason of which all that portion or the greater portion of the bed of the river between Flour Island and the Tennessee shore kept filling up from time to time until it formed the present land between Flour Island and the Tennessee shore?

A. That is right, sir; I reckon.

Q. 22. Please state how far Crutcher Lake extends below this backbone and does it extend below the Polsdorfer houses?

A. The fact of Crutcher Lake is about even with the lower end of the backbone and does not come down as low as the Polsdorfer houses by about two or three hundred yards.

Re-direct examination:

Q. 1. You have stated in your cross-examination that Yankee Bar was formed in 1862 from the sinking of a barge, and west of Flour Island and continued to grow in the direction of Flour Island until it attached itself to the island, now I wish to ask you to refresh your memory, and state whether or not there is now and has been since the formation of said bar a deep depression between Flour Island and Yankee Bar that steamboats ply in an ordinary stage of water?

A. Yes, there was last fall a deep depression between Yankee Bar and Flour Island. That this depression has been there I know for four years, this last fall. How much longer I could not tell you, a small steamboat could run there in a high stage of water.

Q. 2. State if you know whether or not that deep cut or depression has or has not been there between Flour Island and Yankee Bar from the time the bar formed and do you know that Yankee Bar ever attached itself to Flour Island?

A. If this depression separates Yankee Bar from Flour Island, then Yankee Bar never formed onto Flour Island, but if it does not separate it, then Yankee Bar has attached itself to Flour Island.

Q. 3. You have stated in your cross-examination that there is a road leading from the head of Flour Island to the Tennessee shore and that there is very little depression in the land across the island to the Tennessee shore. Now, will you please state what depression or slope there is in traveling this road from the island to the Tennessee shore and whether the slope is from the island in the direction of the Tennessee shore or the slope comes from the Tennessee shore going in the direction of the island and how much higher, if any, is the bank on the Tennessee shore than the land made up from the island or the channel of the old Mississippi river?

A. There is not depression enough to notice unless a person pays particular attention.

And further this deponent saith not, to wit.

E. C. Cooper.

8. The deposition of Chas. Bowen was read as follows:

Capt. Charles Bowen, being first duly sworn, deposes as follows, to wit:

Q. 1. Please state your name, age, occupation and residence.

A. Name, Charles Bowen; my age, 85 years; occupation, farmer; Mississippi county, Arkansas, residence.

Q. 2. Are you acquainted with the parties to this suit?

A. I am acquainted with some of them; I know Mr. Marley and Mr. E. M. Ayres; I have met Mr. Polsdorfer.

Q. 3. How long have you resided in Mississippi county, Ark.?

A. About 70 years, maybe a little over.

Q. 4. Are you acquainted with what is known as Flower Island? How long have you known it?

A. I am acquainted with it, have been on it often, I have been knowing it ever since 1832.

Q. 5. State where Flour Island is located?

A. It is located between Plum Point and Ft. Pillow.

Q. 6. Where was the main channel of the Mississippi at the time you first knew Flour Island?

A. The main channel of the river ran to the left of the island going down and over next to the Tennessee shore.

Q. 7. Your first acquaintance with this island was before Arkansas was admitted into the Union as a state?

A. Yes, it was several years before.

Q. 8. How long did the main channel of the Mississippi river continue to run on the left of Flour Island in going down the river?

A. I can't bring to my mind the year that the river changed, but think it was about 1839 or 1840.

Q. 9. Please state whether or not the main channel of the Mississippi river changed from the left side to the right side of said island, after the 16 day of June, 1836, the date upon which Arkansas was admitted into the Union?

A. I think it did, I am of the opinion that it was in 1839 or in 1840.

Q. 10. State whether or not the state of Arkansas at the time you first knew it down to the present time claimed the lands on said island, also state where the same were surveyed by the general government and sectionized as Arkansas lands and also state to what county the same was attached, what section, township and range the same was located, and whether, if you say the same was attached to Mississippi county, Arkansas, taxes were

assessed against the land on said island and collected by the authorities of Mississippi county, Arkansas.

A. When I first knew the island Arkansas was then a territory. It was surveyed by the general government and sectionized as Arkansas lands and attached to Mississippi county, Arkansas, as fractional sections 17, 18, 19 and 20, township 12, north range 12, east of the 5th principal meridian, taxes were assessed and collected on this land by the authorities of Mississippi county, Arkansas for the county and state.

Q. 11. State whether or not you at any time have been sheriff and collector of Mississippi county, Arkansas, if so when and how long?

A. I have been sheriff and collector of Mississippi county, Arkansas, commencing about 1845. I was sheriff and collector 16 years. My brother was sheriff and collector of Mississippi, Arkansas, from about 1837 to 1845. I was deputy sheriff under my brother for five years preceding my election to the office of sheriff and collector.

Q 12. State whether or not you as sheriff and collector of Mississippi county, Arkansas, or as deputy sheriff and collector under your brother, you as such official ever assessed and collected taxes on Flour Island or Sections 17, 18, 19 and 20, township 12, range 12 east, if so, when and from whom did you collect?

A. I did assess and collect taxes on Flour Island on Sections 17, 18, 19 and 20. I don't know exactly, but it was along in 1844, '45 & 1846, somewhere along about that time. I can not remember the name of any one except Mr. Barns, but the other fellow paid taxes on these lands to me. I did collect from Mr. Barns.

Q. 13. When were you last on Flour Island?

A. Not since 1861 that I remember of.

Q. 14. About how much land was then on Flour Island in 1861?

A. I suppose there was about 400 or 500 acres.

Q. 15. Was this 400 or 500 acres that you saw there in 1861 heavily timbered and high land?

A. Yes, it was high land and heavily timbered.

Q. 16. What was the condition of that part of the old channel of the Mississippi River lying between Flower island and the Tennessee shore at that time?

A. There was water nearly all the way around the island.

Q. 17. You have stated that you was on this island in 1861, how often were you on this island and what were you doing?

A. I was on the island nearly every day for five or six weeks. I commanded a company of Confederate soldiers and was there drilling.

Q. 18. Where was you camped at this time, and how did you get to the island?

A. We was camped at Ft. Pillow, Tenn., and crossed to the island on an old boat which was used as a bridge.

Q. 19. Where was this drill ground situated?

A. On the foot of Flour island.

Q. 20. Did you have at this time any occasion to go from the foot up to the head of the island?

A. I did not except on a boat one time.

Cross-Examined.

Q. 1. Up to what date did you last collect taxes on these lands?

A. I collected the taxes until the lands were sold for taxes.

Q. 2. About what time were they sold for taxes, and when sold, were they not forfeited to the State?

A. It was several years before the late war between the States, and they were forfeited to the State, and no more taxes were paid on them until recently when Mr. Ayres got possession of them.

Q. 3. When you first knew what is now called Flour island, long about 1832, is it not a fact that there was then in existence, where the present Flour island is located, two distinct islands, known as 32 and 33?

A. There was two islands known as 32 and 33 at that time.

Q. 4. How were these two islands separated?

A. By chute of the river running between them.

Q. 5. Now, when the channel of the river changed, as stated by you, along about 1839 or 1840, did not the channel change, too, and run down the chute between these two islands?

A. When the channel changed it struck the head of 32 harder than it did 33, which threw the channel through the chute between the two islands, and caused the river to sweep away 32, thus leaving the channel on this side of 33.

Q. 6. Island 32 then was on the Arkansas side and smaller than 33?

A. Yes; that is correct.

Q. 7. I believe I understood you to say in your direct examination that you have never been on Flour island since 1861?

A. I think 1861 is the last time I was on it.

Q. 8. You don't know then whether any of the original island, which you say was there in 1861, is there now or not?

A. No; I do not know. I haven't been on it since 1861.

Re-direct examination:

Q. 1. You have stated in your cross-examination that you collected taxes on this land up until it was forfeited to the State, which occurred before the war between the States, will you please state whether there is now in the office of clerk of the Circuit Court the proper custodian of all the records of forfeitures of lands for the non-payment of taxes that occurred prior to the war between the States; if you say there is none, what has become of them?

A. All the records of forfeitures were destroyed in about 1862.

Q. 2. State whether or not the Legislature of the State of Arkansas passed an act in 1882 in which all forfeited lands were placed upon the tax books of all the counties in the State, and taxes assessed against them, and bills were filed in the Chancery Court of each county in the State to enforce the collection of over-due taxes, and that these lands, among others, were decreed by the Chancery Court of Mississippi County, Arkansas, to be sold for the payment of the back-taxes due from the same, at which sale John A. Lovewell became the purchaser of said lands, who afterwards sold and conveyed them to the defendant, E. M. Ayres?

A. There was such a law passed, and my understanding is that these lands were sold and that John A. Lovewell bought them, who afterwards conveyed them to Mr. Ayres, the defendant.

Q. 3. You have stated in your cross-examination that there was two Flour islands as known as No. 32 and No. 33, that 32 washed entirely away. I will ask you to state at what time Flour island 32 disappeared entirely?

A. It disappeared entirely about the time the river changed its channel from the left side of Flour island No. 33 to the right side thereof, in going down the river, which was about 1839 or 1840.

Q. 4. State upon which island Barns and Hardin entered their lands, and upon which you afterwards collected State and county taxes?

A. I collected off of Barns from island No. 33, which is the island in the present controversy.

And further this deponent saith not.

Charles Bowen.

9. The deposition of James D. Driver.

James D. Driver, being first duly sworn, deposes as follows, to wit:

Q. 1. Please state your age, name, residence and occupation?

A. My name, James D. Driver; age, 69 years; Mississippi county, Ark., is my place of residence, and am farmer by occupation.

Q. 2. Are you acquainted with the parties to this suit?

A. I am acquainted with Marley and Ayres.

Q. 3. Are you acquainted with what is known as Flour Island, located in the Mississippi river below the town of Osceola, Arkansas; if so, state how long you have known it?

A. Yes, sir; I might say I am. I have known it ever since the year 1859.

Q. 4. Who, if any one, was living on this island at the time you first became acquainted with it, and what was its condition as to improvements, and how much high land there was on the island at the time you first knew it?

A. I don't really know who was living on it right at that time, I don't remember. There was cleared land on it, and a double house, I think, a frame house and some other little buildings. I think there was some 3 or 4 acres that seemed to be higher than the rest of the island, and I suppose there was 40 acres of cleared land that was higher than the made land that was around it.

Q. 5. Was this 40 acres of cleared land, at the time you first knew it, being cultivated by any one?

A. Old man Hip was cultivating this land, and I understood that he owned the land, and he was the owner of William Hip, who has testified in this cause, who I saw several times on the island from 1859 up to 1862.

Q. 6. How far did you live from this island from 1859 to 1862, and state whether or not you often visited the island during that time, and for what purpose?

A. I suppose about five or six miles. I didn't visit the island often, occasionally I was down there; I had a good many stock and when they strayed I went over on the island to look for them.

Q. 7. Upon what part of the island were the improvements described by you located?

A. They were on what I would term the upper end of the island, the houses were, and the cleared land ex-

tended down below the houses, in the direction of the foot of the island.

Q. 8. When did you last see any part of the houses that you found on this island at the time you first became acquainted with it?

A. I don't remember when was the last time, now. I moved from the other side of the river about the year 1873. I haven't been on the island since 1873.

Q. 9. State when you last saw any part of the improvements—houses or cleared land—on this island that you found there in the year 1859 when you first saw it?

A. Well, I don't remember about the houses, just when was the last time I saw them, but I do remember seeing part of the field since the year 1873.

Q. 10. About how often did you visit this island between the years 1859 and the year 1873, when you moved from the other side of the river, and also state at the various times you visited same you observed the conditions of the island, and especially as to when you last saw any part of the improvements whilst on the island?

A. I have a distinct recollection of being on this island in the latter part of 1864 or the early part of 1865, and stayed all night with William Hip, the witness who has testified in this case and who was living in this frame house that I knew and remember as being there when I first knew this island; upon reflection I am satisfied it was in the spring of 1865 that I stayed on this island.

Q. 11. About how much of this cleared land did you discover there in 1865 when you spent the night on the island?

A. The clearing seemed to be about the same as when I first knew it in 1859; the banks seemed to be a little closer to the houses.

Q. 12. In your various visits to the island looking after your stock, from the year 1859 to the year 1873, the time you moved from the Tennessee side of the river, did you go in the main over the entire island, or was you in position to see over the entire island; if you say you was, state about how much, or give the year that you remember to have seen for the last time any part of the cleared land on this island that William Hip was occupying in 1865 when you spent the night on the island?

A. I don't remember the last time I was on the island. I am satisfied that I was on the island probably subsequent to 1865; possibly as late as 1873, but I have no distinct recollection as to when it was or the circumstances; all that I remember is that I was down there looking for stock at various times, and paying but little

attention to the condition of the island, more than as I have already testified to, that between the years 1859 and 1865 that I noticed this field and houses, which was upon what appeared to be a part of the original island, but I have passed there since the year 1873 on steamboats and saw a part of this cleared land of the original island.

Q. 13. State whether or not there was in the spring of 1865 any accretion or newly formed land that attached itself to the original Flour island; if so, how much?

A. Yes; there seemed to be a great deal of newly formed land attached to the island. I suppose there was 500 or 600 acres, possibly more. I would rather guess more than this.

Q. 14. What was the nature and character and growth of timber on this newly made land which had attached itself to the original island, and also state whether or not the timber was larger or smaller as you went from the island in the direction of the Tennessee shore?

A. It was mostly all cotton wood; there was some willow and sycamore. I suppose they were in size from one foot to 16 inches in diameter; there might have been some larger. That was over next to the river and above the head of the island, and as you advance from the island towards the Tennessee shore the timber got smaller and the land got lower, and along the side of the main shore there was considerable signs of the old river, by the holes of water that had never filled in with sand.

Q. 15. What was the nature and character of the banks on the Tennessee shore opposite Flour island from 1859 to 1873, and state whether the same were sloping or perpendicular; also state whether there was any accretion or newly formed land built up and attached to the Tennessee shore, upon a level with the main banks; if you say there was not, state about how much higher the main banks of the Tennessee than the bed of the old Mississippi river?

A. It had filled in some under the bank. The Tennessee banks was from 6 to 10 feet higher than the old bed of river; this was the condition of the banks where I crossed, which was one-third of the way down the old river bed. I don't know how it was above that, but it seemed to get higher above that place and lower as you went below it. In some places the Tennessee banks was nearly perpendicular, but where I crossed it was sloping. There was no newly formed land where I was that was on a level with the Tennessee banks. I could not say how it was above where I crossed.

Q. 16. Was this crossing alluded to in your above

answer above or below the head of the original island?

A. It was above the head of the original island.

Q. 17. You have stated in this deposition that in 1865 there was 500 or 600 acres of newly formed or accretion land that had attached itself to the original Flour island prior to that date; now state what, if anything, intervened between this newly formed or accreted land and the main bank of the Tennessee shore?

A. A part of it was joined to the Tennessee shore without anything intervening in other places there was ponds or pools of water between it and the Tennessee shore and near the Tennessee shore there was no timber, as it was mostly water, I suppose the timber had never come up, and up above the head of the island the timber extended all the way across to the Tennessee shore in the bed of the old river.

Continued by consent to May the 29, 1899.

Cross-Examination.

Q. 1. You have stated in your direct examination that the last distinct recollection you have of visiting Flour Island was in the spring of 1865, when you stayed all night with William Hip; now it is a fact then, is it not, that subsequent to that period up to 1873, when you moved away from Tennessee, whilst you think it quite probable that you occasionally visited the island, that you have no recollection whatever of its particular condition as to how much, if any, of the old original island was in existence subsequent to 1865?

A. I went on the island a few days after I stayed all night with Hip. It was the day after Forrest had the fight at Ft. Pillow, and subsequent to that period my visits to the island, if any, were of such a nature that I did not give such attention to the condition of the island as to now enable me to remember how much, if any, of the old original island was in existence subsequent to 1865.

Q. 2. At the times you visited this island you were on your own business, were you not, hunting stock, and there was nothing that particularly called your attention to the condition or appearance of this island, was there?

A. Well, yes, the last time I was there the gun boat was about the foot of the island and turned herself broadside as though she had a notion of shelling us, and I looked across the island pretty frequently. She being on one side and I on the other, there was several of us there at the time. She stood fair to us as there was nothing in the way between where we were and the boat, the water

so surrounded us that there was no way for us to escape only through this field, and this incident caused me to notice particularly that there was a field between us and the gun boat, with this exception my observations of the condition of the island were casual. I remember hearing that from the time of my first visits to the island up to 1865, there was a field of some 40 or 50 acres, some houses and some three or four acres along the edge of the field and the old river, which seemed to be higher than the balance of the island, and had some large timber standing on it, and it was also higher than the newly made land that was adjoining the island.

Q. 3. In all of your statements made in your direct examination relative to the condition of the height of the land, pools of water and size and nature of the growth of timber in between Flour Island and the main Tennessee shore, are based upon your recollection as you remember the situation up to the time you left Tennessee in 1873, are they not, and that since that period you have no knowledge of the condition of the land in between the island and the Tenn. shore?

A. Yes, my statements are based upon my recollections of the condition of the island up to the time I left Tennessee in 1873, and I have no knowledge of its conditions subsequent to that period.

Q. 4. And your statements relative to the condition of the land, pools of water and timber in between the island and the Tennessee shore are applicable exclusively to the lay of the land below and in the neighborhood of where you crossed, are they not?

A. Yes, that is correct.

Q. 5. Then for all you know it may have been all filled in between the head of the island and the Tennessee shore above where you crossed and for some distance above, and the land might have been of equal height from the island to the Tennessee shore?

A. Yes, it might have been so filled in, as I don't know how that was.

Re-direct Examination.

Q. 1. I believe you have stated in your cross-examination that the point that you usually crossed from the Tennessee shore to Flour Island was above the head of Flour Island, now how far above the head of Flour Island was that crossing place?

A. I think it was about a half a mile, or probably more.

Q. 2. Who claimed to be the owner of the land on the

Tennessee shore at this particular crossing place?

A. Dave Friend.

Q. 3. Who is the owner of that land now?

A. B. W. Hale and Mr. Renfro are the owners of the land now.

Q. 4. What is the condition of the banks of Old River on the Tennessee shore from this crossing place described by you in going down the old channel of the Mississippi River in the direction of Ft. Pillow, and especially how much higher, if any, are the banks on the Tennessee shore from this particular crossing place?

A. From this crossing place down to Ft. Pillow the banks on the Tennessee shore are from 4, 5, 7, 8, 10 and 12 feet above the channel of the Old River, and was mostly covered with water, that is the old bed of the Mississippi River next to the Tennessee shore was mostly covered with water.

Re-cross Examination.

Q. 1. Then do I understand you to say that in crossing from about the Dave Friend place to the island, you rode all the way on high, dry ground from the Tennessee shore to the head of the island. In fact, that the bed of Old River from the head of the island and upwards had filled up, so as to make it one continuous neck and body of land from the head of the island to the Tennessee shore up in the direction of the Dave Friend place?

A. All up in between the head of the island and the Tennessee shore in the direction of the Dave Friend place was filled up so that it was all one continuous reach or body of land. And further this deponent saith not.

J. D. Driver.

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(10) Deposition of Jacob Cox.

Jacob Cox, being duly sworn, testifies as follows:

Q. 1. State your name, age, residence and occupation.

A. Jacob Cox; aged 68 years; reside at Osceola, in Mississippi County, Arkansas; by occupation a pilot, but have retired from duty.

Q. 2. Are you acquainted with a certain island located in the Mississippi River above Fort Pillow, Tennessee, known as Flour Island, and if so, for how long a time have you been acquainted with its location?

A. I am. I have known Flour Island since the year 1840.

Q. 3. Where was the channel of the river in 1840?

A. To the right of the island. It had changed, so I understood, a short while before.

Q. 4. Did all of the original Flour Island wash away?

A. It did not; there was about three hundred acres of the island that was never moved or washed. To this land there has accreted to all sides thereof new land. About five years ago steamers ran along this island on the west side where the channel was then, but at this time they bear directly to the Arkansas shore, the present course of the channel from Fort Pillow, Tenn.

Cross-Examination.

Q. 1. How do you know that as much as 300 acres of the original Flour Island has never washed away?

A. I judged of the amount from viewing it from the river. I was never on the island in my life.

Q. 2. Do you know whether the accretion or made land around Flour Island was originally made to Flour Island or the Tennessee shore?

A. I don't know.

Q. 3. Do you know whether this land has been made all the way from Flour Island to the Tennessee shore?

A. I do not.

Q. 4. Do you know where this land is situated from which the brush in controversy was cut, and do you know whether that land was accretion to Tennessee or Flour Island?

A. I do not, and don't know as to accretion.

And further deponent saith not.

Jacob Cox.

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(11) Deposition of T. A. Matthews.

T. A. Matthews, being duly sworn, testifies as follows:

Q. 1. State your name, age, residence and occupation.

A. T. A. Matthews; aged 40 years; reside in Osceola, Arkansas; by occupation deputy clerk of Mississippi County, Arkansas.

Q. 2. Are you acquainted with a certain island situated in the Mississippi River above Fort Pillow, Tennessee, commonly known as Flour Island, and if you say you are, please state whether or not the same is claimed and taxes paid thereon as part of Mississippi County, Arkansas, and give the section numbers of the same as they appear on the records of said county?

A. I am acquainted with the island known as Flour Island. The same is claimed as part of Mississippi County, Arkansas, and taxes paid thereon as such. The same is described on the records of said county by survey numbers as all of Section 17, all of Section 18, all of Section 19, and all of Section 20, in Township 12 North and Range 12 East.

Q. 3. Have you a copy of the plat of Township 12 N. and Range 12 E. in which is situated Flour Island, and if so, please file the same as Exhibit No. 1 to your deposition?

A. I have, and herewith file the same as Exhibit No. 1 to my deposition.

And further deponent saith not.

Cross-examination waived.

T. A. Matthews.

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(12) E. M. Ayres then offered in evidence the record of the cause of Toof, McGowan & Co. against E. M. Ayres and E. L. McGowan, Trustee, being No. 13210, on Esquire J. M. Coleman's docket, as follows:

State of Tennessee, Shelby County.

Attachment No. 13210.

Toof, McGowan & Co.

vs.

E. M. Ayres.

Before J. M. Coleman, J. P.

Affidavit.

Before me, J. M. Coleman, a justice of the peace, in and for said county and state, this day personally appeared E. L. McGowan and made oath that E. M. Ayres is indebted to Toof, McGowan & Co., in the sum of three hundred and three and 96-100 dollars, due by note, and that the claim is just and that the said E. M. Ayres is a nonresident of the State of Tennessee. He therefore prays an attachment against the estate of the said E. M. Ayres.

E. L. McGowan.

Sworn to and subscribed before me, this 21st day of January, 1891.

J. M. Coleman, J. P.

Bond.

We agree and bind ourselves to pay to E. M. Ayres the sum of six hundred and six dollars. But the condition of the above obligation is such that whereas, Toof, McGowan & Co. have this day sued out an attachment against the estate of said E. M. Ayres for the sum of three hundred and three and 96-100 dollars. Now, should the said plaintiff prosecute the said attachment with effect, or in case of failure pay the defendant all costs that may be adjudged against him, and also such damages as he may sustain by wrongful suing out of such attachment, then this obligation to become null and void, otherwise to remain in full force and virtue.

Witness our hands this 21st day of January, A. D. 1891.

Toof, McGowan & Co.
T. J. McGowan.

Writ.

State of Tennessee, Shelby County.

To the Sheriff or any Constable of Shelby County—Greeting:

Whereas, E. L. McGowan has complained on oath before me. J. M. Coleman, a justice of the peace in and for said county and state, that E. M. Ayres is justly indebted to the said Toof, McGowan & Co. in the sum of three hundred and three and 96-100 dollars, due by note, and affidavit having also been made in writing and bond given as required by law in attachment cases, you are hereby commanded to attach so much of the estate of the said E. M. Ayres as will be of value sufficient to satisfy the debt and costs according to the complaint; and such estate, unless replevied so to secure that the same may be liable to further proceedings thereon to be had before me or some other justice of the peace in and for said county, so as then and there to compel the said E. M. Ayres to appear and answer the complaint of the said Toof, McGowan & Co. when and where you will make known how you have executed this writ.

Witness my hand this 21st day of January, A. D. 1891.

J. M. Coleman. (Seal.)

Summons to Garnishee.

Toof, McGowan & Co.

vs.

E. M. Ayres.

State of Tennessee, Shelby County.

To Hunter & Fry:

I summon you to appear before J. M. Coleman, justice of the peace for said county, at his office in Memphis, No. 3 Madison street, on the 21st day of January, 1891, at 12 o'clock m., to answer on oath what he is indebted to one E. M. Ayres, against whose property I have an attachment in my hand in favor of Toof, McGowan & Co., and what effects of the said E. M. Ayres you have in your hands or know of any other person or persons having to the best of your recollection, knowledge or belief, and I notify you not to pay to the said defendant any debts now or hereafter to become due, but to retain possession of the same and all property and effects of said defendant which may come within your control up to the time of your answer to this garnishment.

Given under my hand this 21st day of January, 1891.

A. J. McLendon, Sheriff.
By J. M. Coleman, Jr., D. S.

Return.

There being no property to be found in my county, either real or personal, upon which to levy this attachment, I have therefore garnisheed Hunter & Fry to answer before J. M. Coleman, a justice of the peace, at his office in the city of Memphis, on the 21st day of January, 1891, at 12 o'clock m., a copy of said garnishment herewith filed and made a part of this return, this 21st day of January, 1891.

A. J. McLendon, Sheriff.
By J. M. Coleman, Jr., D. S.

Answer of Garnishees.

C. W. Hunter, a member of the firm of Hunter & Fry, in answer to the within garnishment, says that his firm made a contract with the U. S. government to furnish willows loaded on barges for matresses; that his firm made

a contract with E. M. Ayres, who agreed to let Hunter & Fry cut the willows upon his land, for which they owed to Ayres four hundred dollars, but before they paid this amount to Ayres one Hobbs claimed that he was entitled to the amount of $400 for said willow timber. Affiant, in order to get further time to ascertain who was the legal owner of said claim, gave to one Lovell, for account of E. M. Ayres, a sixty days' draft on Hunter & Fry for $500, which included a balance of an old account, which draft was presented to-day for acceptance, and was refused by Hunter & Fry. We are indebted in the above amount to some one, and are ready to pay the same as soon as the legal parties are known.

C. W. Hunter.

Sworn to and subscribed before me, January 21, 1891.

J. M. Coleman, J. P.

Judgment.

Toof, McGowan & Co.,

vs.

E. M. Ayres.

In this case Hunter & Fry having been summoned as garnishees and answered that they were indebted to either E. M. Ayres or E. L. McGowan, trustee, in the sum of four hundred dollars due for willow brush cut upon a certain tract of land which is claimed by both of said parties; and after hearing proof in said cause as to the ownership of said debt of $500. I am of the opinion that E. M. Ayres is entitled to said amount of $500. I therefore give final judgment against the garnishees, Hunter & Fry, in favor of Toof McGowan for the sum of two hundred and ninety-seven 88-100 dollars being amount of their claim as proven, and for the further sum of fifteen 30-100 dollars costs in said cause for which execution will issue.

This April 29, 1891.

J. M. Coleman, J. P.

Appeal.

Appeal prayed by E. L. McGowan, trustee, and prayer granted to the Circuit Court of Shelby County, May 1, 1891.

J. M. Coleman, J. P.

To the reading of which the plaintiffs objected.

The purpose for which defendant wished to introduce this record was that: While McGowan as trustee held the Hobbs land a controversy arose between him as trustee and E. M. Ayres for the timber cut on this island and this contest went to a judgment and Mr. Ayres got this money the price of the timber. I claim that settled the claim to this land to Mr. McGowan and that it binds his privies in estate and Polsdorfer is his privy in estate as to the 400 acres mentioned in this suit and it estops him to set up any claim to the accretions if there are any to the 400 acres.

The court sustained plaintiff's objection to the reading of the foregoing record and the defendant E. M. Ayres excepted.

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(13) Fortner's deposition was read.

B. W. Fortner, being first duly sworn deposes as follows:

Q. 1 State your name, age, residence and occupation.

A. B. W. Fortner, age 56, Miss., Co., Ark.; farmer.

Q. 2. Are you acquainted with the parties to this suit if you are state how long you have known.

A. I know Mr. Ayres. I know Hunter & Fry when I see them 10 or 11 years.

Q. 3. Are you acquainted with an island in the Mississippi river situated near the town of Osceola, Ark., known as Flour Island. If so, state how long you have known it?

A. About 15 years.

Q. 4. State whether or not during your fifteen years acquaintance with this island, you had occasion to often visit the island during that time, or whether or not you lived upon said Flour Island. If you say you did state when and the length of time you lived there?

A. I was often on the island during this time, I moved on the island four years ago. I lived on the island nearly 18 months.

Q. 5. State whether or not there was any one, occupying the island at the time you moved on it 4 years ago. If you say there was anyone occupying this island state who it was. Either in person or by Tenant, and what was the nature and character of the improvements (if any)?

A. There was not when I moved in the house they had moved out, up to the time of my moving on the

island it was occupied by William Anderson as tenant of E. M. Ayres. At the time I moved on the island there was two houses on the part I moved on to. There was ten acres of cleared land. There was a good deal cut off in front next to the Miss. river. These houses were put there by E. M. Ayres and claimed by Mr. E. M. Ayres.

Q. 6. Upon what part of Flour Island were these houses, and the ten acres of cleared land located and about how far from the main bank of the Tennessee shore?

A. On the north corner, it was about 3-4 of a mile straight out to the Tennessee shore.

Q. 7. State if you know about how far these houses and the cleared land was from Fort Pillow, and how far above or below said Fort Pillow?

A. It was 2 1-2 miles from where these houses and cleared land were located to Fort Pillow. Fort Pillow was below the island on the Tennessee shore.

Q. 8. State if you know about the number of acres of land you found on Flour Island 4 years ago, if you say you do give the amount the character and nature of the growth of timber that you found there?

A. There was about 3000 acres—there was different kinds and different size of timber on the old part from that found on the newly made land. On the old land there cottonwood, mulberry, hickory, box elder and sycamore. I cut cottonwood logs on this old land that were 4 1-2 feet in diameter, the sycamore was from two to 3 feet in diameter. I did measure the sycamore but think there was some larger than that. I have made as many as 4 posts out of the mulberry, I think they were from 18 to 20 inches in diameter. On the newly made land, cottonwood and willow on this land different sizes some of it large enough for house logs, from that size down to good brush size.

Q. 9. State if you remember, the condition of the banks of the Tennessee shore opposite this island 4 years ago when you went there and particularly the height of the banks above the bed of the old channel of the Mississippi river, and also state whether or not the old channel of the Mississippi river was or was not plainly defined near the banks of the Tennessee shore?

A. I remember the condition of the banks of the Tennessee shore opposite this island at the time I went on said Flour Island 4 years ago. The height of the original banks of the Tennessee shore at the lower end of this island, I don't know but steamboats ran up there

and up to where Cole creek empties into the Mississippi river, and it was a bluff bank from 30 to 50 feet in height, the water from 30 to 40 feet deep at that time, from Cole creek up the Tennessee bank for one mile up Old river and opposite this land was from 3 to 5 feet higher than the bed of the old channel of the Mississippi river, from this point a mile above the mouth of Cole creek; then set in a solid lake of water, running up the bank 1-4 of a mile next to the Tennessee shore—the water being from 5 to 10 feet according to the seasons of the year. From the upper end of this lake bayou sets in and there are places that the banks are 10 feet, and from that place the bank varies from 3 to 5 feet all along up the Tennessee bank to the head of the island.

Q. 10. State whether or not you cultivated 4 years ago that part of Flour Island that you found cleared, at the time you went there. If you say you did, state whether or not from your cultivation of same you made any discoveries that the same had been formerly occupied, if you did state what that was?

A. I did cultivate the land 4 years ago, and in plowing the same I plowed up old brick bats, old iron and old shovel plows. This was the same spot that I was informed by old citizens was formerly occupied by old man Hip.

Q. 11. State from your acquaintance with this island, whether or not the newly made or accretion land formed from the Flour Island in the Mississippi river, and went out in the direction of the Tennessee shore, or vice versa?

A. The newly made or accretion land formed on the island and went out towards the Tennessee shore, and did not form on the Tennessee shore and go out towards the island, as the Tennessee banks were bluff ranging 3 feet in the lowest to 40 or 50 in the highest place, above the bed of the old channel of the Mississippi river, and the old channel of the Mississippi river is to-day plainly marked.

Q. 12. State if you remember upon what part of Flour Island, the plaintiffs Hunter & Fry, cut the willow brush, give the time or times the same was cut as near as you can remember?

A. It was on the Arkansas side of the island near the water of the Mississippi river and close to where the main channel of the river now is, where they cut the willow brush, they cut there last year and years. And I know this because I went there and tried to stop them.

Q. 13. State how far this brush, that you stated the

plaintiffs cut last year and year before last, was from the main banks of the Tennessee shore, and in what direction from Fort Pillow, Tennessee, the distance from Fort Pillow whether above or below said Fort Pillow.

A. Straight across the island it is about 2 miles, and on the lower end it is about 3-4 of a mile from the Tenn. shore. It is up the river and northwest of Fort Pillow, and about 1 1-4 miles above Fort Pillow.

Cross-Examination.

Q. 1. Have you ever testified in the other suits that were brought concerning this Flour Island property?

A. I have not. This is the first time I have ever testified about the property.

Q. 2. Did you ever tell Mr. E. M. Ayres that defendant in this suit that you once swore to a lie, for Price in the other suit. And that Price would not give you anything for it?

A. I never had any such conversation with Mr. Ayres.

Q. 3. Did Mr. Ayres go to you a short time ago and talk with you as to what you knew, about this Flour Island property?

A. Mr. Ayres came to see me about the suit, and told me he wanted me to come up to Osceola, Ark., to give my deposition. But did not say what he wanted me to testify to.

Q. 4. At the time you went on to the island 4 years ago, did you move there in your own interest or behalf or in the interest of some one else, and if so how came you to go?

A. How I came to go was I was working for Mr. Hobbs. Hobbs & Marley claimed the land, and I went there as their tenant, to hold possession for them.

Q. 5. How long had the 10 acres (which you say was cleared when you went there) been cleared?

A. The 10 acres had been freshly cleared, and look as if it might have been old field that had been re-cleared.

Q. 6. How much land was there on that island at the time you went there of the same kind and character as this field you speak of as having been cleared and of the land of which you say there were large cottonwoods, sycamore, mulberry, hackberry, etc.?

A. We surveyed the land on the main island and made it 2600 acres. I had the county surveyor. And of that 2600 acres I think about 1-3 was of the same character and growth of timber, as that which was cleared, and that upon which the large timber stood

about which I have testified.

Q. 7. How far down the river, did this heavily timbered land extend from where the houses stood, in one of which you lived?

A. About 1 1-2 miles.

Q. 8. During that mile and a half of timber lands, was the size and character of the timber pretty much the same?

A. The character and size of the timber was very nearly the same except at the lower end there was some water "Bushes."

Q. 9. About how wide was that strip of land, upon which you say this large timber stood?

A. In the middle it was from 3-4 to 1 mile wide, and came down to almost a point at each end.

Q. 10. How deep does the land on the Tennessee shore, opposite this island overflow in time of high water?

A. Over the greater part of the bank, the deepest overflow is 4 feet, and in the low places it overflows 10 or 12 on the Tennessee shore around Old river.

Q. 11. It is a fact is it not that during season of the year, there is dry land all the way across to the Tennessee shore?

A. At the upper end it is dry all the way across, nearly all the time except when the water is high. But below there only dry place in very low water, and in some places there is water standing almost the entire year round.

Q. 12. You have stated in your deposition that you found in plowing indications of a previous settlement or occupation by turning up old brick bats, old iron shovel plows and etc., was this on the 10 acres where the houses stood in one of which you lived?

A. It was in the same field around those houses.

Further deponent saith not.

his
B. W. X Fortner.
mark.

Witness,
T. A. Matthews.

The defendant, E. M. Ayres, was then examined as follows:

Examination by Judge Heiskell.

Q. What is your business, age and where do you live?

A. I am 59 years old.

Q. Where do you live?

A. Osceola, Arkansas.

Q. What is your occupation?

A. I farm at present and run a saw mill.

Q. Are you E. M. Ayres, one of the defendants in this suit?

A. Yes, sir.

Q. What connection, if any, have you with Flower Island?

A. I own it. I bought it and paid for it.

Q. Bought it and paid for it?

A. Yes, sir.

Q. From whom?

A. From Mr. J. A. Lovewell.

Q. Well have you got any other claim on it?

A. Yes, sir.

Q. What other claim?

A. I bought it at a tax sale.

Q. Here is a deed, I will just show you one as a sample.

A. Yes, sir.

Q. That is one of the fractional sections? How much do you claim and where do you claim?

A. I claim from the original bank of the Tennessee on the east bank of the Mississippi river now.

Q. From what point above Ft. Pillow or above Coal creek?

A. Well, the land sets in right in front of Ft. Pillow and runs on up for a mile on Old river then comes to the mouth of Coal Creek and from there it circles and goes on up into the Mississippi river again.

Q. Do you claim the whole accretions below Plum Point to the Mississippi river?

A. Yes, sir.

Q. When did you buy?

A. I bought from Lovewell, I think, in 1884.

Q. What acts of ownership, if any, did you begin to exercise over the island?

A. I began cutting the timber and selling it to the government. I had a contract with the United States, and the contract was so large that I couldn't fill it without buying everything in sight. I had a contract for 50,000 sticks.

Q. What do you mean?

A. 50,000 trees; it took a tree to make a pole.

Q. When you bought from Lovewell what did you do to this property?

A. I paid them and put some men there to cut for me.

Q. How long did it take you to cut that 50,000 sticks?

Q. How much, if any, did you cut on the island? How long did it take you to do it?

A. I can't say how much I cut on the island.

Q. Did you cut from 1884 to what date?

A. Well, I cut in 1884 and in 1885, and I think the contract expired in 1886.

Q. Then you were cutting around on the island that timber from 1884 to 1885?

A. Yes, sir; I had hands cutting in different places all the way up the river.

Q. Did you cut considerable off that ground?

A. Yes, sir.

Q. State whether or not anybody ever interfered with you while cutting that timber?

A. No, sir; nobody ever interfered with me.

Q. After this what other acts of ownership did you exercise over that island?

A. Well, they got into some kind of trouble about the brush and they came to me and I told them to go ahead.

Q. When was that?

A. I can't locate the date except in this way; I had to bring suit, the first thing done I went down to collect my money and Hunter was controlling the camp, and he said it was Mr. Marley's land, and I said I didn't know what Marley has to do with this property. And he said Marley claimed it and I would have to pay him for it. And I said I didn't want to take any undue advantage of Mr. Marley, but all I wanted was to get charge of what I was owed. You give me a draft for sixty days. That is just exactly the words we had. Well, I will give you the draft. It seems to me I turned it over to the sheriff, but I don't know now. But the draft came here in a few days and I got notice that the draft had been enjoined and that I had better come down and see about the claim and I went down and brought my witnesses and lawyers and it was tried before Coleman, Squire Coleman.

Q. Is this this suit we had before?

A. Yes, sir; it was for $400 for brush and 100 for hauling, and he said—

Objected to by Mr. Randolph.

Objection sustained.

Q. There was a trial before Coleman?

Objected to by Mr. Randolph.

Objection sustained.

The defendant now offers to show by the witness as showing the possession and transfer of the island the re-

sult of this allegation above sustained was that he got the $500, the price of the timber cut on the island.

Mr. Randolph objects.

Objection overruled.

Q. Without reference to the law suit what became of the $500.00, the price of the timber?

A. Furnished—

Q. Just answer that question. I say, without any reference to the law suit what became of the $500.00, the price of the timber?

A. Mr. McGowan read me—

Q. Just tell what you did?

A. I got the money.

Q. Toof, McGowan & Co. claimed the money, didn't they?

A. No, sir; my understanding was just this, that Mr. Hobbs claimed the money and McGowan was Hobbs' trustee, and he had control of Hobbs' business, and he brought suit against me for the money, and I proved to the court that the money was mine.

Q. Well, you got the money?

Mr. Randolph: I move to exclude that testimony from the jury because it does not relate to any possession of the land. Objection overruled. Exception noted.

Q. Now, if you had another contract for timber on the island, state what the result—

Mr. Randolph: I object to that. Objection overruled and exception noted.

Q. State that now?

A. Yes, sir; I sold some brush and it amounted to about $150.00, and when I came to get the money I met Williams and he came to me and asked if I had an interest in that brush contract.

Q. Well, who got the money?

A. I got the money.

Q. Did you have any controversy?

A. Yes.

Q. That was for brush cut off of the island with Hunter & Fry?

A. I had another contract with Hunter & Fry, under which they paid me and they went into a suit and tried to claim it.

Q. I don't want to know anything about what he claimed. That is the Chancery suit, is it?

A. Yes, sir.

Q. What did you get as a result of that suit?

A. I got four hundred dollars and interest on that money.

Q. What was that for?

A. For the price of the timber.

Q. Cut under contract with you on this island?

Mr. Randolph: I move to exclude all the testimony about Hunter & Fry's contract. The motion was denied and exception noted.

Q. Now, if you ever put anybody on that island, please so state?

A. I put a lot of hands down there and a man by the name of Anderson.

Q. When was that contest with Williams, where you got the one hundred and fifty dollors?

A. I think that was in 1891—that is the first one, and I think the next season, in 1892, from Williams, and then Hunter & Frey for 1893.

Q. That was the brush cut in 1893?

A. Yes; the 25th day of October, 1893.

Q. Now you say you put Anderson there in what year?

A. I don't recollect just exactly when I did put Anderson there.

Q. Well did you put him there in 1891 or 1892—somewhere along there?

The Court: Can't you put the date after some of the other transactions?

A. It was after the first one.

Q. That was somewhere in 1890 or 1891?

A. Yes, sir. I am pretty well satisfied it was in 1891 or 1892.

Q. How many besides Anderson did you put there? What were their names?

A. Some I don't recollect the names of: Tom Evans and Harry Pate, William Anderson and his brother, L. E. Mills, and Evans' son—five of them I think, or six.

Q. What did you put them there for?

A. To build a house and clear the ground.

Q. Well, what did they do?

A. They built three houses right where the Fortner house is, and they built the Fortner house. At that time it was a big log house, with a side room—a kind of shed room, and a porch, and they made it out of big logs and covered it.

Q. That Fortner house—isn't that house standing now?

A. Yes, sir; just one room of it.

Q. (The Court) Did I understand that Anderson and others built the Fortner house?

A. Yes, sir.

Q. What year?

A. About 1892.

Q. Did I understand you to say it was a big log house?

A. Yes, sir; and a shed room on one side, and a porch around it.

Q. What else did they build?

A. They built some outhouses—a smokehouse and maybe a stable. I know they had mules there.

Q. State what other work they did there?

A. They cleared all the land in the space of about four or five acres.

Q. That was all the houses they built?

A. All the houses they built there. I built the same year, and another fellow with me, and I went up to put these houses in different settlements for Graham and Shand, and I took a contract to build on Yankee Bar, and these fellows built three houses on Yankee Bar and two on the bar just below.

The Court: Is it Yankee Bar now?

A. Yankee Bar is connected with the main land now.

Q. It is all connected now. Whereabouts is that situated with reference to the Fortner house, or the backbone?

Mr. Randolph objected.

The Court: My understanding is that in the description in this declaration this Yankee Bar is not included, but if it is not in the law suit it doesn't make any difference.

Q. Where is this Yankee Bar with reference to the Fortner house that you built?

A. Well, it is west—it is kind of southwest from the Fortner house.

Q. How far?

A. I suppose it is a mile.

Q. How long has Yankee Bar been incorporated into a part of this island?

A. (No answer.)

Q. Does it go dry all the while?

A. There is just only water between it when it is an overflow.

Q. It goes dry all the while. What is the size of Yankee Bar?

A. I can not tell. It extends toward the island and out there so. I cleared sixty acres of land on it and built six houses.

Q. Does that part of this island overflow—what about that?

A. It all overflows.

Q. To what height?

A. It is difficult to keep people there at all, because the water comes up there and stays.

Q. The fact is what about the water? How high does it get over the island?

A. In 1898 the deepest water, in the shallowest place it was 18 inches deep, and in the bed of Old river twenty or thirty feet deep. You could see the marks on the trees.

Q. What is the character of the timber in Arkansas, about Crutcher Lake?

A. Well, there is a good deal of timber there that measured eight, nine, ten, thirteen feet in circumference. Some of it measured thirteen feet, nine inches.

Q. When did you measure that?

A. Last Sunday.

Q. Right on the head of this place called the backbone—that backbone—where is that?

A. The backbone is on the east side of Crutcher Lake.

Q. On the Tennessee side?

A. Yes, sir.

Q. How far from the Fortner house?

A. Something near a quarter of a mile. Not quite so far.

Q. Something has been said in the testimony about a slough between the Fortner house and the high point?

A. Well, there is a low place.

Q. Well, now, how is it—dry?

A. Certainly; dry all the time unless there is an overflow.

Q. Just a little depression—a kind of a slough.

Q. Do you know whether the timber over there was large or small timber? About what was the size of it?

A. Some of it was twenty-four inches in diameter.

Q. How high from the ground?

A. About six feet from the ground.

Q. When did you measure it?

A. Last June.

Q. Well, you didn't measure near as high as we did this time. How far was it—three feet from the ground?

A. Six feet—something like that.

Q. Who else measured it?

A. Judge Heiskell and a darkey by the name of John Bell and me. The tree we then measured was 16 feet 9 inches in circumference.

Q. John Bell?

A. Yes, sir.

Q. What is the character of that backbone and the size of it?

A. Well, sir, it appears as old made land. Just like old made land on the main shore.

Q. How high is that backbone?

A. I can't tell exactly.

Q. Well, what about the land from this Fortner house towards the Tennessee shore?

A. Well, it goes off level, I suppose—about a quarter of a mile, and then it goes on down until it strikes nearly to the Tennessee bank, and there is water laying against the Tennessee bank. Some places it is low and the water stands in there.

Q. When you strike that water, what then?

A. There is a bluff, or kind of high bank.

Q. What is the nature of that bluff or bank from Coal Creek up to the Marley grant?

A. I only know from seeing along there the line I saw run there.

Q. When did you see a line there?

A. Last Sunday, marked right across the country there.

Q. Projecting the Marley north line across the island, where would it strike?

A. Two-thirds of the backbone would be lying northwest of this line.

Q. The north line of the Marley grant projecting into the Mississippi river would cross the backbone near the north end of the backbone?

A. I do not know whether it would—

Objected to by Mr. Randolph. Objection overruled.

The Weatherford map was here introduced. P. 97 of this transcript.

Q. Here is the Polsdorfer or Marley 5000 acres; here is the Mississippi running here, and here would be the north line of the Polsdorfer grant.

Objected to by Mr. Randolph. Objection overruled, the Court saying: It is entirely competent to show to a witness a map or plat of the land in controversy and ask him if according to his knowledge the map is correct.

Exception noted.

Q. At the point A, projecting the line, and going out to the point on the island, does it strike, at all, that backbone?

A. Well, now, to explain that right—

The Court: Just answer his question.

Q. Where does that line project to the Mississippi river if it strikes it at all?

A. I have only seen this. There was a line and it runs right across the backbone, two-thirds of the way from the backbone down to the river.

Q. Does the river there run east and west?

A. Yes, sir; that is, nearly east and west.

Q. Where is that line that you saw there?

A. On the east side of the Fortner place, running right across.

Q. Running right across this place, along a little northwest of the Fortner house; that is the backbone there they are talking about. Running it from the mouth of Coal Creek along that whole front on this 5000-acre grant, what quantity of water, if any, is in Old river?

A. Well, Old river—where did you mean, now? From Fort Pillow around?

Q. Yes, sir; tracing the line of the 5000 acres along the original Tennessee shore?

A. My understanding about those 5000 acres grant, it don't go below the mouth of Old river. The banks are high land until it strikes this line.

Q. How about the water in Old river?

A. Well, some places it would go around and there would be water that laid there all the year round, and around there there is very little vegetation. Then there is water from the mouth of Coal Creek along to the original Tennessee shore and the whole front of the 5000-acre grant—there is water or pools of water—it is very near there.

Q. It is either a continuous river or pools of water?

A. Yes, sir. A horse can not cross there at all.

Q. The intermediate times between 1886, when you had finished the contract for the 50,000 poles for the government, up to the time of this collection of those amounts of money you have spoken of before, what acts of ownership, if any, did you exercise in those years?

A. I had no contract for brush or poles, but I would have to go there every once in a while to see if there were any depredations on it.

Q. In 1894, state what you did there at Coal Creek, if you did anything?

A. In 1894 I cut a tree.

Q. Where did you cut it?

A. Right on the old island, above the river. It was a tree that measured forty-two inches in diameter.

Q. Where was it? Towards the Tennessee shore?

A. Yes, sir.

Q. How far?

A. I suppose 500 yards from the shore—from the original bank.

The Court: How far from the Fortner house?

A. Three-fourths of a mile.

Q. What was the size of that tree?

A. Forty-two inches in diameter.

Q. How many rings had it?

A. Fifty-six rings.

Q. Then you indicate what the age of a tree—

Mr. Randolph objects. Objection overruled.

Exception noted.

Q. Well, how old was it?

A. Fifty-six years old.

Q. Mr. Ayres, how did that tree compare in size with that one I measured with you?

A. That tree is a larger one, and older looking tree, by the appearance of the bark.

Q. What is the appearance of the bark?

A. Rough and thick.

Q. The bark is rougher and thicker as the tree gets older?

Q. As the tree gets older do these rings grow smaller or larger?

A. I would suppose they grew smaller.

Q. Wouldn't you know that to be so?

A. Yes, sir.

Q. Something has been said in this testimony about a slough running from around this high point down to Hepright pocket?

A. Yes, sir.

Q. There is no slough there?

A. No.

Q. Well, what is there?

A. A gradual descent out towards the Mississippi river, and the timber is bigger at the old land and gets smaller on the new land.

Q. It gets smaller does it?

A. Yes, sir; I have got a book with a measurement in it. There is timber there 24 inches in diameter.

Cross-Examined by Mr. Randolph.

Q. Mr. Ayres, is that the deed you claim under?

A. Yes, sir. That is the Lovewell deed, isn't it? I claim under this one and under that.

Q. Just read that deed to the jury.

A. What do you mean by that?

Q. Just at the top of it. Just read the deed.

A. Well, I can't.

Q. Well, let me read it for you.

A. Yes, sir; you read it.

Mr. Randolph reads the deed.

Q. That is the description by which you bought the land? That is all the land you bought and all the deeds you got?

A. Yes, sir.

Q. Is that a copy of the Lovewell deed?

A. Yes, sir.

Q. You know that?

A. Yes, sir.

Q. Now I will read this to you. (Here reads.) Are those the lands you claim?

A. Yes, sir.

Q. That is the only deed Lovewell got that you know of?

A. Yes, sir; the only deed.

Q. Now, Mr. Ayres, do you know William Anderson?

A. Yes, sir.

Q. Is he the man you put on the land?

A. Yes, sir.

Q. And Jno. Anderson, his brother?

A. Yes, sir.

Q. And William Rowland?

A. No, sir.

Q. And L. E. Mills?

A. Yes, sir.

Q. And Mrs. Anderson?

A. Yes, sir.

Q. And do you know J. H. Pate?

A. Yes, sir.

Q. Were those the men that went on the land with you?

A. Yes, sir; the men that Anderson carried there. I employed Anderson and he employed his own men.

Q. Were you present at the trial that these men had? Did you go there?

A. I went there the night before.

Q. You knew of the trial?

A. Yes, sir. I had a suit here in Memphis and I came down here on Saturday afternoon to attend a suit in chancery for a thousand dollars of insurance money, and when I got here I thought about that little suit up there with those men and I got on the train and run up to Ripley on Saturday and hunted up Marley at his office, and I went to Marley and he says—

Objected to by Judge Heiskell. Objection overruled.

Q. Now, you say you were here attending to a lawsuit and hunted up this M——?

A. Yes, sir; and I asked Mr. Marley if I couldn't at-

tend to this suit, and told him I couldn't be here and he had better put it off, and he says, no, I can't do it, and he says it is Hobbs' law suit, it has got to go on, and I says I can't be there, and I got on the train and come home.

Q. Were the men on the island—

A. No, sir.

Q. Do you know why?

A. I only know from what they say.

Q. Do you know of your personal knowledge?

A. No, sir. I think high water run them off.

Q. Isn't it a fact that the island is only habitable in low water?

A. No, sir; never has been to my knowledge.

Q. Never has been, did you say?

A. When I built that Fortner house I didn't build it high enough up, and when the water come up to it there is nobody could stay in it.

Q. You have never lived on the island?

A. No, sir.

Q. Never stayed there?

A. No, sir.

Q. Never had a tenant to cultivate it?

A. Yes, sir.

Q. Who was it?

A. Anderson.

Q. Did he stay there after that year?

A. No, sir.

The Court: That suit says the Andersons were ejected.

Mr. Randolph: Yes, sir.

Q. Mr. Ayres you say there was a tree about three quarters of a mile east of the Fortner house?

A. Yes, sir.

Q. Forty-two inches in diameter?

A. Yes, sir.

Q. How far is it from Old River?

A. I suppose three or four hundred yards.

Q. In what seems to be the bed of the Old River?

A. No, sir.

Q. Outside of the bed?

A. Yes, sir. It was very near on a level with this Fortner house land. Just after you leave this tree 200 yards the land seems like it took an offset down and went on clear to the Tennessee shore. This land was not depressed land—not before the land goes down so rapidly.

Q. When did you go to Osceola?

A. I came to the state in 1865.

Q. What part of the state?

A. Right in the neighborhood of Osceola.

Q. You didn't know this country before 1865?

A. No, sir.

Q. When you came there, then, where was the river with reference to this land?

A. On the west side of the island.

Q. Was there any hole on the east side of this land?

A. No, sir; not that I ever saw.

Q. Do you recollect Craighead point—do you recollect where it is?

A. Yes, sir.

Q. What is it on—Craighead point?

A. On the bank.

Q. Is it cultivated?

A. Yes, sir; it is cultivated.

Q. Isn't it a promontory extending out into the river; is it a straight bank?

A. No, sir; a kind of curved bank.

Q. See if you can locate Craighead point.

Government Map No. 6 here introduced. This map is p. 38.

Q. Now, you are looking north; here is Island 34; that is up the river, isn't it, and then, if I understand you correctly, the Mississippi is out west of this point, and that is Craighead Point?

A. Yes, sir.

Q. It has been there ever since you knew it?

A. Ever since I knew it.

Q. Did you ever have anything to do with this land before you took it from Lovewell?

A. No, sir; not particularly.

Q. You really never had seen this land, or been on it?

A. The river was there, and it was an island when Lovewell showed me this property, and we went there towards the Mississippi river. The timber was what I was after. I wanted to see how many trees was on it.

Q. How many acres did you find there?

A. I couldn't tell you.

Q. How many thousand acres?

A. I couldn't tell you.

Q. Didn't Lovewell tell you?

A. No, sir; he never told me anything about it.

Q. You saw his deed?

A. No, sir.

Q. And he didn't tell you that you were buying 150 acres?

A. No, sir.

Q. How long is that line down to the river?

A. Five or six miles.

Q. And he didn't tell you how many acres there were in it?

A. No, sir; he just showed me the general outlines of the deed.

Q. And he showed you that you were buying all of fractional sections 17, 18, 19 and 20?

A. No, sir.

Q. Isn't this the deed?

A. Yes, sir; that is the deed.

Q. Well, don't you know it contains that fractional section, about 156 acres?

A. No, sir.

Q. You didn't know that fractional section 18, there had 35 acres in it? And that section 19 had 81 acres, and that section 20 had 18 acres?

A. No, sir; I didn't know there was in the Lovewell deed.

Objected to by Judge Heiskell. Overruled and exception noted.

Q. You understood that you were buying land in Mississippi county, Arkansas, but you found it on the east side of the river?

A. At that time it was up, and the understanding was that it went to Old River.

Q. But still on the east side of the channel of the Mississippi river?

A. Yes, sir.

Q. That was something you didn't know anything about, wasn't it?

A. I knew it when I went and looked at it. I knew it was Old River.

Q. But not how old it was?

A. No, sir.

Q. You hadn't seen it until 1865?

A. I wasn't on that island until about 1884. I went down there and examined the land before I did make the trade.

Q. Well, it was all one transaction, wasn't it?

A. Well, I went down there two or three days before I traded.

Cross-examined by Judge Flippin:

Q. How long since you went up to the mouth of Coal Creek, towards Yankee Bar, close to Old River?

A. I was up there a month or six weeks ago.

Q. Tell us something about the water in Old River at this time?

A. There is no water where Coal Creek and the Old

River go; that is the old original bed of the river.

Q. Did you mean no standing or running water?

A. No running water there.

Q. Is there any water above there?

A. Yes, sir.

Q. How far above?

A. I can't tell you the exact distance.

Q. Do you know where this west line of the Woodfolk grant is? I believe Judge Heiskell showed you the map?

A. I only know from what I saw running across the island. There was a blazed line there.

Q. I am talking about where that west line crosses Old River?

A. No, I do not know where that strikes it.

Q. Does this line from up above Crutcher Lake, as you go south and east towards Old River—does the land rise or descend?

A. What?

Q. As you go down towards the Mississippi river?

A. You mean on Crutcher Lake?

Q. As you go from Crutcher Lake towards the Tennessee shore?

A. Yes, sir; it goes down.

Q. As you go from Crutcher Lake going north from the Tennessee shore to Old River do you descend or ascend?

A. Descend.

Q. So is the bed of Old River easily distinguished along the Tennessee shore clear around to the mouth of Coal Creek, or not?

A. Yes, sir.

Q. Is there a depression there?

A. Yes, sir.

Q. How wide is it?

A. Some places a good width. Then others I suppose it would make an average of probably one hundred feet.

Q. One hundred feet? Well, is there any place you can go across that depression?

A. Yes, you can walk across.

Q. What is the character of the timber in the bed of Old River?

A. Growth of small willows.

Q. As you go from that towards the body of the island, does the timber grow smaller or larger?

A. It commences getting larger.

Q. (Judge Heiskell): I understood you to state to Judge Flippin that the water there was no running water at the mouth of Coal Creek.

A. Yes, sir.

Q. (Mr. Randolph): You had a suit with Frey at Osceola about this land, didn't you?

A. No, sir; it was commenced there, but didn't amount to anything.

Q. It was commenced there?

A. Yes, sir.

Objected to. Overruled.

Q. Then you had a suit with Frey about the land?

A. Yes, sir.

Q. What became of it?

A. Well, I really don't know what became of it. I couldn't tell you for my life what became of it.

Q. Did you pay the costs?

A. No, sir.

Q. Is it pending now?

A. I reckon.

Q. Is it ended?

A. I reckon.

Q. Well, you mentioned about measuring a tree; isn't that what you call a double tree, with two sets of roots?

A. No, sir.

Q. Didn't the water wash away the earth from around it, and couldn't you see the roots of the tree, and that it was a double tree and didn't Bell measure it with you on Sunday?

A. No, sir.

Q. (Judge Heiskell). Isn't it a fact that the water washed down around it and took the earth away, and that you could see the roots?

A. There is some great big roots there that run eight or ten inches through.

Q. Do you know anything about paying the taxes on this island?

A. I paid it there since I owned it.

Q. That is since 1884?

A. Yes, sir.

Q. Where did you pay it—Tennessee or Arkansas?

Mr. Randolph: Have you any tax receipts?

A. Yes, sir.

Q. Got them with you?

A. Yes, sir.

Objected to by Judge Heiskell.

Mr. Randolph: I call for them and I want to see them. I want to see just what you paid on it by these receipts.

(Witness produces same.)

Q. Is that the only one you have?

A. No, sir; one more here. That is for 1889. You see we paid taxes for 1889.

Q. No, sir; that is for 1897?

A. Well, 1897, or '98. Well, now, 1899 hasn't been paid.

Q. Isn't that all you have paid?

A. That's all I have got here.

Q. Did you buy this land for non-payment of taxes in 1895?

A. Yes, sir; in 1895.

Q. You didn't pay taxes after that year?

A. No, sir; the land was sold, and then I let it sell, and I bought the land in.

Q. You have offered these deeds in evidence as evidence of your title?

A. Yes, sir.

Q. There are four of them that embrace all the title?

A. Yes, sir.

Q. In all of Sec. 17, township 12, range 12, there are 120 acres; that is all you paid on?

A. Yes, sir.

Q. And in Sec. 18, township 12, range 12, there are 35 acres, and that is all you paid on?

A. Yes, sir.

Q. And in Sec. 19, township 12, range 12, there are 81 acres?

A. Yes, sir.

Judge Heiskell: Mr. Ayres, you paid taxes on the land that the state of Arkansas assessed, didn't you?

A. Yes, sir.

Q. That is Flower Island, and that has been on the assessment books from that time up to this present time?

A. Yes, sir.

Q. And that is the only land assessed—the old original island?

A. Yes, sir.

Q. But you paid on the Flower Island?

A. Yes, sir.

Q. Now, you have paid all the taxes demand on Flower Island since you have had possession of it except in 1895 when you let it go by?

A. Yes, sir.

Q. From 1884 up to the present day?

A. Yes, sir.

The Court: Is there any law that exempts accretions from taxation?

Judge Heiskell: I think not.

Judge Flippin:

Q. Just one question: I will ask how many thousand acres does your claim embrace—eight or ten thousand?

A. I don't know.
Q. Well, give us a reasonable guess?
A. Well, I couldn't tell you.
Q. You bought 256 acres of land?
A. Yes, sir.
Q. And the balance is accretions all around the island?
A. Yes, sir.
Q. You bought 256 and all the accretions?
A. Yes, sir.
Q. And you claim all the accretions of the original Flower Island? Do you call them accretions running up 13 miles?
A. Yes, sir; if it goes on up to the original Tennessee bank.
Q. Why did you stop at Plum Point?
A. It runs into the main river there.
Q. (Mr. Randolph). That is the deed you got it by?
A. Yes, sir.
Q. (Judge Heiskell). And that deed covers Flower Island and all the accretions?
Mr. Randolph: Does that deed mention Flower Island? Doesn't it mention fractional sections 17 to 20?
A. That is the meaning of it.
Q. Does it say Flower Island?
A. That is the meaning of it.
Witness excused.

(14 1-2.) The defendant, E. M. Ayres, offered to read the decree in Hunter & Fry vs. E. M. Ayres, in the Chancery Court of Shelby county, Tennessee, as follows: Chancery Court, Shelby county, 8889. C. W. Hunter and Joseph Fry, partners under the firm name of Hunter & Fry, vs. E. M. Ayres, Thomas Price and J. H. Polsdorfer. This cause came on this day to be heard before Chancellor John L. T. Sneed, upon the bill of interpleader, the answer and cross-bill of E. M. Ayres the answer and amended answers of Hunter & Fry, complainants thereto, the pleadings, exhibits and the argument of counsel together with the depositions of E. M. Ayres, James D. Driver, Chas. Bowen, T. A. Mathews, Jacob Cox, William Hip, B. W. Fortner, David Lawrence, and W. R. Warren, for Ayres and W. E. Price; Jo. C. Marley, A. L. Dromilard, Marshal J. Miller, C. W. Hunter, Joseph Fry, James Stewart, E. Fritz and R. V. Cain, for Hunter & Fry, and upon the deposition of Jno. P. Laney,

taken by Hunter & Fry, and which they declined to read and which was read by said Ayres as his proof and upon the record in the case of E. M. Ayres vs. B. W. Fortner, from Mississippi county, Arkansas, and also the record of the case of F. H. Hobbs vs. William Rowland, E. M. Ayres, et al., from Lauderdale county, Tennessee, and upon the admission at the bar of the open court by said Ayres, through his solicitor that he acquired no title to the land upon which the willows grew under his deed from John A. Lovewell and shown in the record herein, because the tax sale under which Lovewell bought was illegal and void under the laws of Arkansas and passed no title to said Lovewell, but that under the deed of Lovewell and wife to him with over seven years' possession he acquired a fee simple title, the deed being color of title. And it appearing to the court that complainants filed their bill of interpleader herein on October 25, 1893, alleging among other things that they had cut 4000 cords of brush from Flour Island and that defendants Ayres, Price and Polsdorfer each claimed the price of the brush from them and that while they were willing to pay the owner thereof for the brush they did not know who said owner was, and, therefore, they asked that these parties be compelled to interplead in this cause; and it further appearing to the court that defendant, Price, passed out of the case by demurrer, and Polsdorfer by consent and that E. M. Ayres filed his answer and cross-bill in which he claimed that he should be paid $400.00 for the said brush, or 10 cents per cord, both because he owned Flour Island and also because he had entered into special contracts with said Hunter & Fry by which they bound themselves to pay him said $400.00, both of which grounds said Hunter & Fry contested in their answers to said cross-bill, claiming that Thomas Price owned Flour Island under a grant from the state of Tennessee of date November 7, 1891, and that the correspondence relied on by Ayres to make out a contract did not bear that construction and did not amount to a contract, upon which points the proof aforesaid was taken; and the court being of opinion therefrom that said Flour Island was and is in and a part of and belongs to the state of Arkansas, and never was in or a part of the state of Tennessee and that therefore any grant of the same or any part thereof from the state of Tennessee is void and that the said Flour Island never did all wash away and disappear, but that some of the same remained and that to this that remained the accretions formed, making the land then as it now is, the court so holds; and the court is therefore of opinion that Thomas Price

took nothing by his grant from the state of Tennessee because the same is void as this state can not grant lands in Arkansas; and the court further holds from the proof in this cause that the lines and bounds of said grant to said Price do not cover the lands when the brush in this cause was cut and therefore in no event could Price claim payment therefor.

The court further holds that E. M. Ayres under his deed from John Lovewell and wife of date August 2, 1884, and by virtue of his actual adverse, continuous and uninterrupted possession and claim thereunder for more than seven years before the date of Price's grant and before the bringing of this suit acquired the fee simple title to Flour Island and all of the accretions thereto including the place where the brush here in controversy was cut and therefore he is entitled to be paid for said brush; and the court is further of opinion from the proof that the said C. W. Hunter and Joseph Frey are bound to pay him therefor at the rate of 10 cents per cord or $400.00, with interest from the time said brush was taken from the island, to wit, from September 22, 1893, which interest amounts to this date to the sum of $52.80, making principal and interest $452.80. It is therefore ordered, adjudged and decreed by the court that the said E. M. Ayres have and recover of the said C. W. Hunter and Joseph Fry, partners as Hunter & Fry said sum of $452.80, four hundred and fifty-two and 80-100 dollars with interest thereon from this date until paid for all of which execution will issue as at law. And it is further ordered that the complainants Hunter and Frey pay the costs of this cause for which let execution issue against them and Samuel Scheibler surety on cost bond.

Now, thereupon, come the complainants C. W. Hunter and Joseph Frey and pray an appeal from the decree now made and from all decrees heretofore made in this cause to the next term of the Supreme Court of this state which is granted upon their giving bond and security as required by law.

But upon plaintiff's objection it was excluded and defendant excepted.

15. The defendant E. M. Ayres then read to the jury a certified copy of a patent from the United States to D. Hardiman of date February 1, 1843 to fractional sections 17 and 18 on island. Also a certified copy of a patent to John C. Barnes of date May 12, 1847, to fractional sections 19 and 20 on island:

Certificate No. 3750. The United States of America.

To all to whom these presents shall come—Greeting:

Whereas D. Hardiman, of Madison County, Mississippi, has deposited in the general land office of the United States a certificate of the register of the land office at Helena whereby it appears that full payment has been made by the said D. Hardiman according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the public lands," for fractional section eighteen and fractional section seventeen (on island) in township twelve north of range twelve east in the District of Lands subject to sale at Helena, Arkansas, containing one hundred and fifty-eight acres and one hundredth of an acre according to the official plat of the survey of said lands returned to the general land office by the surveyor general which said tract has been purchased by the said D. Hardiman.

Now, know ye that the United States of America in consideration of the premises and in conformity with the several acts of Congress in such case made and provided have given and granted and by these presents do give and grant unto the said D. Hardiman and to his heirs the said tract above described to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said D. Hardiman and to his heirs and assigns forever. In testimony whereof I, John Tyler, president of the United States of America have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the first day of February in the year of our Lord one thousand eight hundred and forty-three and of the independence of the United States the sixty-seventh.

By the President John Tyler,

By R. Tyler, Secretary.

J. Williamson,

Recorder of the General Land Office.

(L. S.) Recorded, Arkansas, Vol. 171, page 57.

Department of the Interior.

General Land Office, Washington, D. C.,

December 28, 1899.

I, W. A. Richards, Acting Commissioner of the General Land Office do hereby certify that the annexed copy

of patent in favor of D. Hardiman founded in Helena, Arkansas, cash entry No. 3750 is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

(L. S.) A. W. Richards,
Acting Commissioner of General Land Office.

Certificate No. 4780.

The United States of America.

To all to whom these presents shall come—Greeting:

Whereas John C. Barnes, of Lauderdale County, Tennessee, has deposited in the General Land Office of the United States a certificate of the register of the land office at Helena, whereby it appears that full payment has been made by the said John C. Barnes according to the provisions of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of public lands," for fractional sections nineteen and twenty (on island) in township twelve north of range twelve east in the district of lands subject to sale at Helena, Arkansas containing ninety-nine acres and seventy hundredths of an acre according to the official plat of the survey of the said lands returned to the general land office by the surveyor general which said tract has been purchased by the said John C. Barnes.

Now, know ye, that the United States of America in consideration of the premises and in conformity with the several acts of congress in such case made and provided have given and granted and by these presents do give and grant unto the said John C. Barnes, and to his heirs the said tract aforedescribed; to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging unto the said John C. Barnes and to his heirs and assigns forever.

In testimony whereof I, James K. Polk, president of the United States of America have caused these letters to be made patent and the seal of the general land office to be hereunto affixed.

Given under my hand at the city of Washington the twelfth day of May in the year of our Lord one thousand

eight hundred and fifty-seven and of the independence of the United States the seventy-first.

By the President, James K. Polk,

(L. S.) By J. Knox Walker, Secretary.

S. H. Laughlin,
Recorder of the General Land Office.

Recorded, Arkansas, Vol. 172, page 295.

Department of the Interior,
General Land Office, Washington, D. C.,

December 28, 1899.

I, W. A. Richards, acting commissioner of the general land office do hereby certify that the annexed copy of patent in favor of John C. Barnes, founded on Helena, Arkansas, cash entry No. 4780 is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

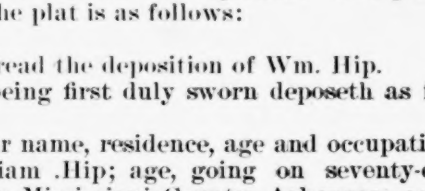
W. A. Richards, Acting Commissioner
of General Land Office.

(16) He also at the same time introduced, exhibited and read to the jury a certified copy of a map and survey from the general land office of the United States made by Daniel Miller and certified by William Clark on the 3d day of March, 1825, being a map and survey of fractional sections 17, 18, 19 and 20, township 12 north, range 12 east, properly certified from Washington which said map and survey is the following:

(17) He also introduced and read a book from the office of the clerk, Mississippi County, Arkansas, showing the entries of fractional sections 17 & 18 by D. Hardiman in the year 1836; also showing the entry of fractional sections 19 and 20 made by J. C. Barnes, in 1846. All these fractional sections being in township 12 north, range 12 east; this is p. 404.

(18) He also offered as evidence a plat from the plat book of Mississippi County, Arkansas on file at Osceola, Arkansas which he claimed showed Craighead Point on the Arkansas shore, and Flour Island as an island in the

Mississippi river and the relative position of these two places. To the introduction of which the plaintiffs objected. The court overruled the objection. The plaintiff's excepted. The plat is as follows:



(19) He then read the deposition of Wm. Hip.

William Hip being first duly sworn deposeth as follows:

Q. 1. State your name, residence, age and occupation.

A. Name William .Hip; age, going on seventy-one years; residence in Mississippi County, Arkansas; occupation farmer.

Q. 2. Are you acquainted with the parties to this suit, if so, how long have you known them?

A. I know Mr. Ayres and Mr. Marley, I have known them for sometime.

Q. 3. Are you acquainted with an island in the Mississippi river, situated below the town of Osceola, Arkansas, known as Flour Island. If you say you are, how long have you known it?

A. I am acquainted with Flour Island, I have known it from 1856.

Q. 4. State whether or not you have ever lived on Flour Island? If you say you did, state the date your residence began, and when you moved off?

A. I have lived on Flour Island, I went on the island in 1856. I moved off in 1862.

Q. 5. State whether or not at the time you moved on said island in 1856 there was any part of the original island there; if you say there was, state your reasons and means of knowing and how much?

A. Yes, sir; I am going by the timber, the old timber that stood on the land. I couldn't tell exactly, but there was a good big piece then, and of the old heavy timbered land there was I suppose one hundred and fifty acres.

Q. 6. State whether or not when you went on this land in 1856 there was any improvements thereon, if so, what was the nature and character of the same?

A. There was about forty or fifty acres in cultivation. There was 5 houses on it, one double house and 4 single houses.

Q. 7. Who was in possession of this island at the time you went there in 1856, and how long had this forty or fifty acres been cleared?

A. Mr. Milt Key was in possession, I couldn't tell but then it was old land, there was no timber standing on it. It had been cleared for years.

Q. 8. How long have you been engaged in the farm-

ing business; and also state whether or not you have during your past life cleared up and put in cultivation a large amount of bottom land in this section of the country?

A. I have been engaged in the farming business all of my life, I have cleared up clean on to 80 or a 100 acres in this section of the country, because I have been taking leases.

Q. 9. From your experience as a farmer and clearing up and putting in cultivation heavily timbered lands in this section of the country and from the condition in which you found this 40 or 50 acres of cleared land on Flour Island, in 1856, how long in your judgment had this 40 or 50 acres been cleared?

A. I think that land from its looks to me, had been cleared about 35 or 40 years.

Q. 10. State whether or not this 40 or 50 acres that you say was cleared in 1856, was entirely free from stumps and trees. If you say it was not state as near as you can remember the size of the trees and stumps standing on that 40 or 50 acres of cleared land. And also state the nature, character and growth of timber on the 75 or 100 acres of high land that had not been brought into cultivation, that you have already stated is a part of the original Flour Island?

A. There was very few stumps on it and no trees; the stumps were from about 2 feet to 3 feet may be 3 1-2 feet in diameter. The size of the timber was from two feet to 3 1-2 feet in diameter. The timber was principally cottonwood. There was sycamore, box elder and Willow and slums [*sic*] on the land.

Q. 11. State whether or not you cleared up and put in cultivation any part of this 75 or 100 acres of high land, outside of and adjoining the cleared land on said island after you went there in 1856. If so state when and how much land you cleared; and state whether or not in clearing the land, you remember a sycamore standing on the land cleared up by you, if so, state the height and diameter of the same?

A. I cleared up about 40 or 50 acres of the land outside of and adjoining the cleared land, I cleared this land up in 1857. I don't remember any particular sycamore, there was a good many sycamores on the land.

Q. 12. State whether or not this large growth of sycamore, cottonwood and box elder and elm, was growing on this 75 or 100 acres of high land outside of and adjoining the cleared land on Flour Island?

A. It was.

Q. 13. Please state how much land there was on Flour Island in 1856, when you went there including accretion or newly formed land?

A. Well, I think there was about 1900 acres any way.

Q. 14. What part of the island did you live on in 1856?

A. We lived on the lower end of the island, about one mile above Ft. Pillow.

Q. 15. How far from the main bank of the Tennessee shore was it where you lived?

A. About two and one-half miles across from the Tennessee shore.

Q. 16. State whether or not at the time you lived on Flour Island there was running water between Flour Island and the Tennessee shore?

A. Only in times of high water in the spring of the year.

Q. 17. You have stated that there was 150 acres of the original island in 1856, and 1900 acres including the original 150, that had accreted to the same. Please state whether this accretion built up and attached itself to the main land on the island, and extended out in the direction of the Tenn. shore, or first accreted or attached itself to the Tennessee shore and built up in the direction of the island. State how that was.

A. It built up to the island and went to the Tennessee shore.

Q. 18. State if you remember the condition of the banks of the Mississippi River on the Tennessee shore opposite Flour Island at the time you lived on said island and also state the height of the banks above the bed of the old channel of the Mississippi River.

A. Back there it had filled up a good deal. Water stood in between the island and the Tennessee shore in places. The banks of the Tennessee shore stood above the channel of the old bed of the Mississippi River in some places four, five, six and in some places ten and twelve feet, about that height, I think.

Q. 19. Standing upon the original island dating from the time you lived on the place, which was 1856 to 1861, and looking out in the direction of the Tennessee shore opposite the island, you will please state whether or not there was any depression or slant in the lay of the land in the direction of the Tennessee shore that had accreted to the island.

A. Yes, sir, there was slant all the way back, after you got off of the old island in the direction of the Tennessee shore.

Q. 20. State, if any, the difference in the growth of the timber on the 150 acres of land that you claim was the original island in 1856 and the 1750 acres of accretion land that had formed on the island at that time.

A. The timber on the accretion or newly formed land was smaller than the timber on the old original Flour Island, the largest on the accreted land was about 2 feet in diameter from that down to little timber.

Q. 21. Please state whether the timber growing upon this accretion as it formed on the original island and extending out in the direction of the Tennessee shore, it decreased or diminished in size.

A. It got smaller all the way from the island to the Tennessee shore.

Q. 22. State what, if anything, was growing in the old channel of the Mississippi River at or near the banks of the Tennessee shore opposite Flour Island.

A. Yes, sir, in places there was so many willow bushes you could hardly pull through in a skiff, in others it was like a pond, as there was no growth.

Q. 23. State whether or not there are large pools or lakes of water now lying against the banks of the Tennessee shore, and between Flour Island and the banks of the old channel of the Mississippi River.

A. In some places there are.

Q. 24. When were you last on Flour Island?

A. About 4 years ago.

Q. 25. Did you examine the land marks on the island at the time you went there three or four years ago?

A. I did examine the timber on the land at that time.

Q. 26. From the observation you made at that time, did you recognize any part of the original Flour Island that was there in 1856 to 1862, the time you lived upon it?

A. I did, there was a very notable place to me when we swam cattle off in 1858 out to the bluff.

Q. 27. State specifically what peculiarity or marks by which you were enabled to recognize this particular spot as being a part of the original Flour Island as it existed in 1856.

A. There was large timber stood on it. It was the high place on the island, and it was the place from which we shipped our cattle from during high water.

Q. 28. State in acres about how much of this high land that you observed there 3 or 4 years ago was there, that you recognized as being a part of the original Flour island as it existed in 1856.

A. I don't think there was any more than about one acre of it.

Q. 29. Had this one acre of high land that you observed there 3 or four years ago ever been cleared?

A. No, sir, it had never been cleared.

Cross-Examination.

Q. 1. How do you know that what you call the original island as you knew it in 1856, of which you say there was then about 150 acres, was the original Flour Island, that was there in 1836?

A. I only go by the growth of the timber that was standing on it at that time.

Q. 2. You don't know, then, of your own knowledge, that it was any part of the original Flour Island?

A. I don't know of my own knowledge. I only go by what I saw and what people tell me.

Q. 3. You have stated that when you went on this island in 1856 there was already a field on it of 40 or 50 acres, on which part of the island was this field situated?

A. About one mile above Ft. Pillow and near the middle of the island.

Q. 4. Was it on what you call the original island?

A. Yes, sir.

Q. 5. Where did you clear up the 40 or 50 acres on the island that you speak of having cleared?

A. Adjoining this old field, but below it towards Ft. Pillow.

Q. 6. Was that also a part of the original island?

A. Yes, sir.

Q. 7. How far was it in 1856 from the head of the island down to where you did the clearing?

A. It was about a mile and a half or 2 miles.

Q. 8. Now, did this original portion of the island that you speak of as being there in 1856, extend all the way up the island from where you did the clearing to the head of it?

A. No, sir, we lived on the upper edge of the old field, and our clearing was below the old and the original island that I speak of only extended about a half of a mile above where we lived.

Q. Then it was about a mile or a half a mile from the upper end of this old island to the head of it, was it not?

A. About one mile.

Q. 10. Was there any of the land you cleared up or any of the old field you say was there still in existence when you was last on the island some four years ago?

A. I couldn't tell you, as I was not down to where the cleared part was. But the last time I was down there,

which was about 20 years ago, there was part of it there then.

Q. 11. You have stated that when you was last on the island 4 years ago that you recognized a part of the original island as it stood in 1856, still being in existence, and locate it by reason of being a point from which you had shipped or driven stock in 1858 how far is this point above where you lived in 1856, and how large a place is it?

A. This place is about one-quarter of a mile from where we lived, at that time there was about one acre.

Q. 12. When you was there 4 years ago, was there not a kind of swag or willow slash lying in between this high land you speak of and the land over on which the Faulkner house is built?

A. I don't know where those houses are built, but there is a swag or willow slash lying in between this high land and the Tennessee shore right up close to high land. I remember seeing some houses there just down below this high land, some houses that was built by Mr. Ayres.

Q. 13. Now, is not the land upon which these houses stand as high as this high land you speak of as being a part of the original Flour Island?

A. I don't think it is. I don't know what the difference is.

Q. 14. How deep is that willow slash that runs between this house and that high land and how wide is it?

A. It is a flat place not over 3 or 4 feet deep and narrow at the beginning and widens out as it extends down.

Q. 15. This house that you speak of there as being built by Mr. Ayres, is on what is now a part of Flour Island, is it not?

A. I don't know.

Q. 16. Now, is it not a fact that in 1856, when you first moved on this island, that there was two islands over there? In other words, there was another island in between the one you lived on and the main Tennessee shore?

A. No, sir, never as I heard of.

Q. 17. Where is the highest land next to the Tennessee shore running out from what is now known as Flour Island? Is it not up above this strip of old Flour Island, which you say was there 4 years ago?

A. It is above this strip of old land that I speak of near the head of the island in going from that point there is a road running from the head of the island to Gold Dust. The land all along this road is all of about the height, up to the Tennessee shore, and in coming out of the Old River bed there is a rise of not more than a foot or two feet in crossing to the Tennessee shore.

Q. 18. It is a fact then, is it not, that in between the head of the island and the Tennessee shore that the soil has filled in there to such an extent as to make it appear to a casual observer to be about the same height as the head of the island and the Tennessee shore?

A. There is not much difference in it.

Q. 19. Unless your attention was particularly called to the fact you could not tell when the land that is filled in there unites to either the island or the Tennessee shore, could you?

A. A casual observer would not notice it unless attention was called to it, and there is a willow slash which the road crosses.

Q. 20. I believe you have stated that there is no running water between Flour Island and the Tennessee shore except in high water. Is that correct?

A. None, only in the spring of the year. None except during an overflow.

Q. 21. Is it not a fact that during an overflow the water covers and runs over the whole business island, Tennessee shore and all, except possibly some very high ridges?

A. Yes, sir, that is a fact.

Q. 22. Now, during the summer time and the fall of the year is the land in between the island and the Tennessee shore not pretty much all dry except when there are occasional pools or small ponds of water?

A. Yes, it is dry, except in places where there are small ponds of water.

Q. 23. Can you not then, in the fall of the year, arrive from Flour Island to the Tennessee shore in a wagon almost anywhere except where these ponds are?

Q. 24. Now, is it not a further fact that in so crossing with a wagon you can go up on to the Tennessee shore at several points or several places, by reason of the fact that there is very little elevation or rise in going up the bank, and in how many places and about how far apart are these places?

A. To my recollection there are only 3 places that you can go up without digging down the bank, at which three places the bank has a slope of about 3 feet. Two of these places are about a quarter of a mile apart and up near the head of the island the other place is down near the end of the island near where I used to live.

Q. 25. In the summer and fall of the year what is the proportion of dry land and pond land in between the island and the Tennessee shore; I mean in the bed of the Old River?

A. About two-thirds of it is ponds in the summer and fall.

Q. 26. How wide is the bed of Old River?

A. It is about one-half or three-quarters of a mile wide before it filled in.

Q. 27. Is Flour Island as high as the land on the Tennessee shore in same vicinity, and how much of it, if any?

A. Now, it is all about the same, I suppose, but I don't know. Flower Island used to be higher than the Tennessee shore.

Q. 28. For what distance does this high land testified by you in answer to seventeen cross-interrogatory extend up and down the bank of the Old River?

A. I reckon it extends for one-half a mile.

Q. 29. You have spoken of the remnant of the old island (about one acre) recognized by you four years ago; how far is this remnant of old island west of the house you say Mr. Ayres built?

A. About a quarter of a mile.

Q. 30. At the time you visited the island 4 years ago, you did so in company with Mr. E. M. Ayres, or did so at his instance, did you not?

A. He got me to go down there with him.

Q. 31. Is it not a fact that you belong to the colored race?

A. Yes.

Re-direct Examination.

Q. 1. In your answer to cross-interrogatory 18 you have stated that between the head of the island and the Tennessee shore that the soil had so filled in there to such an extent as to make it appear to a casual observer to be about the same height as the land on the head of the island, will you please state whether or not there is not now and has been since your acquaintance with this island, a deep depression or willow slough running out from the head of the island and across the entire length of this high land and emptying itself into these lakes or ponds below, thereby dividing the lands that have accreted to the island proper from the lands on the Tennessee side?

A. It has been so long since I have been over the island, and it has been washed out and filled up in so many different places, till I took this willow slag to be the place where it emptied around in Old River when I lived there.

Q. 2. When did you last see this willow slough or swag?

A. About four years ago.

Q. 3. About how far is this willow slough located in

its course in running from the head of the island and dividing the high lands that you have described, and down the old channel of the Mississippi River to where it empties into the lakes or ponds which are formed in the old channel below, from the main banks or bank of the Tennessee shore?

A. It has been so long since I was there that I can't tell, and I don't know.

Q. 4. You have stated in your cross-examination that the high land formed on the head of the island and extending out to the Tennessee shore and extends down the banks of the Tennessee shore to a distance of about a half of a mile. Now, will you state whether or not the land so accreted to the island has built up on the Tennessee shore to a level with its banks, if you say it has not then state, commencing at a point on the Tennessee shore opposite the head of the island and running down the Tennessee shore for a half of a mile the extent of the high land and state how much higher if any the banks on the Tennessee side are than this newly formed land in the bed of the old channel of the Mississippi river?

A. There is not much difference. I mean at the head. For a half mile down there was not much difference in it.

Re-cross examination:

Q. 1. How far is it from the head of the island where you say this highest land is located, is it down to the acre of the old original island which have said you recognized 4 years ago?

A. I don't know for certain but I reckon it is something near a half of a mile.

And further this deponent saith not.

William his X mark Hip.

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(20) The plaintiff then introduced the record from the Circuit Court of Mississippi county, Arkansas, paper marked Exhibit P.

In the Mississippi Circuit Court. May Term, 1881.

Be it remembered that there was begun and holden at the court house, in the town of Osceola, Mississippi county, Arkansas, on the 9th day of May, 1881, a regular term of the Circuit Court of said county, when there was present and presiding the Honorable Jesse N. Cypert, judge of said court; Ben H. Bacchus, clerk of said court, and William B. Haskins, sheriff of said county, were also present and assisting in the holding of said court, and the court

being opened in due form of law, by proclamation of the sheriff, the following proceedings were had and duly entered of record upon said 9th day of May, 1881:

The State of Arkansas, on the relation of Mississippi County,

versus

The following list of lands, on which taxes are alleged to be due, and John Crawford, Auditor.

Now, on this day comes said plaintiff and files in court his complaint, in which he sets forth that there are certain taxes due on the following lands:

Fr. all Section 17, T. 12, N. R. 12 E., 120 acres.
Fr. all Section 18, T. 12, N. R. 12 E., 35 acres.
Fr. all Section 19, T. 12, N. R. 12 E., 81 acres.
Fr. all Section 20, T. 12, N. R. 12 E., 18 acres.

(And a long list of other lands, omitted by the clerk under instructions, as being immaterial to the object and purposes of this transcript.)

Be it further remembered that there was begun and holden at the court house in the town of Osceola, Mississippi county, Arkansas, on the 7th day of November, 1882, a regular term of the Circuit Court of said county, when there was present and presiding the Honorable James G. Frierson, judge of said court, Ben H. Bacchus, clerk of said court, and William B. Haskins, sheriff of said county, were also present and assisting in the holding of said court; and the court being opened in due form of law by proclamation by the sheriff the following proceedings were had and entered of record:

Tuesday morning, November 21st, 1882, court met pursuant to adjournment, when there were present and presiding as on yesterday.

State of Arkansas on the relation of Mississippi County,

versus

Certain lands upon which taxes are alleged to be due; and John Crawford, Auditor of the State.

Now, on this day came the plaintiff by Thomason & Edrington, Lyles and Harris, attorneys, and it appear-

ing to the court that the order herein requiring the owners of all lands in this suit to appear and show cause why a lien should not be declared on the lands named in the complaint herein, has been duly published in the manner required by the statute, and it appearing to the court that John Crawford, auditor of the state of Arkansas, has been duly and personally served with process in this cause; more than twenty days prior to the first day of the present term of this court; thereupon came W. B. Edrington, prosecuting attorney for the Second Judicial Circuit, of this state, and representing the state in this case, and thereupon came A. B. Rosell, B. A. Rosell, C. A. Miller, Lizzie Miller, Walter Solynhoe, Sallie Solynhoe, Maria L. Petet, Eliza Dennis, E. A. James, E. D. Malist, W. W. Dennis, George Dennis, The Ozark Land Company, a corporation organized under the laws of the state of Missouri, J. J. Harner, Thomas Dunn, Thomas Lafferty, Jas. M. Hanks, Emma F. Mathews, J. H. Mathews, Virginia D. Diamond, Austin Boyd, by John B. Boyd, their solicitor, and file their several answers herein, claiming an interest in certain lands hereinafter described. And also came the Memphis and St. Louis R. R. Co., by E. H. Mathews, its attorney, also comes E. M. Apperson, W. H. Wood, Napoleon Hill and V. V. Lafonte, by their attorneys, Myers & Sneed, and also comes the Missouri and Ark. R. R. Co., by Henry C. Clark, its agent and file their respective answers herein. All of said answering parties are, by leave of the court, made defendants in this cause. And this cause coming on for hearing upon the complaint, and exhibits, the several answers of the several defendants and proof, and the cause being submitted, the court finds that there not any valid assessments or assessments returned and on file in the office of the clerk of said county of Mississippi, and that each and every of the forfeitures of each and every year of the lands sued on in this cause heretofore made from the year 1865 to and including the year 1882 are and were absolutely and utterly void for want of a valid assessment, as a basis, and for various fatal defects, in the various forfeitures, and that by and through said several forfeitures no title whatever passed to the state of Arkansas to and for any of the lands sued on in this cause, and hereafter described in this decree. It is therefore ordered, adjudged and decreed by the court that all of the sales and forfeitures or pretended sales and forfeitures to the state of Arkansas of said lands and each and every part thereof heretofore made or attempted to be made for and on account of the non-payment of the taxes claimed to be due thereon, be

and the same and each and every part thereof, are hereby set aside, annulled and canceled and for naught held, for each and every year from 1865 to 1882, inclusive. It is therefore ordered, adjudged and decreed by the court that all of the lands sued on in this cause and not answered for be and they are decreed to be placed upon the assessment roll and assessed according to law, which list is as follows:

Fr. all Section 17, T. 12, N. R. 12 E., 120 acres.
Fr. all Section 18, T. 12, N. R. 12 E., 35 acres.
Fr. all Section 19, T. 12 N. R. 12 E., 81 acres.
Fr. all Section 20, T. 12, N. R. 12 E., 18 acres.
(And a long list of other lands, omitted by the clerk under instructions, as being immaterial to the object and purposes of this transcript.)

By like consent it is further decreed that when any of said defendants pay or cause to be paid, the amount decreed against any tract or parcel of said lands hereinbefore described, the clerk of the court as commissioner, shall execute to said owner a certificate, showing the payment of the same; which certificate shall be in form, so certified, that it can be recorded; and it is further ordered, adjudged and decreed by the court that a lien be and the same is hereby decreed upon each and every tract of said land for the amount of taxes due thereon, under this decree. And also a lien is decreed on each tract pro rata for the costs of this action. And it is further ordered, decreed and adjudged by the court that the sum of one cent per acre of each tract be allowed the plaintiff for the benefit of Thomason & Edrington, and Lyles & Harris, the solicitors who conducted this cause; and said amounts are taxed as costs. And it is further ordered, adjudged and decreed that fifteen cents for each tract, as the tracts appear on the list above, be paid to the said county for L. Rossan, proprietor of the Osceola Times, the newspaper in which the list of lands was published. And also that there be allowed to Ben H. Bacchus, the clerk of said court, for all of his services as clerk and commissioner of this court, performed and by him to be performed in the premises, the sum of one and one-half mill per acre on each acre answered for herein. And it is further ordered, adjudged and decreed that said several amounts are due upon said lands and unpaid; and sixty days are now given to the land owners in which to pay the same; and if the same be not paid at the expiration of said sixty days then the said Ben H. Bacchus, clerk of this court, or his successor in office be and he is now appointed commis-

sioner of this court to sell the same; and in default of such payment, the said Ben H. Bacchus, commissioner as aforesaid, will proceed at once and without delay to give twenty days' notice required by the acts of the general assembly of 1881, and proceed to sell said lands, or so much as may not be paid on, at public outcry, at the front door of the court house of said county, between the hours fixed by said acts. And said commissioner shall give to the purchaser a proper certificate of purchase and file his report of sale at once, according to law, reporting all his actions, and money by him collected, and the fund to which it belongs.

Be it further remembered that there was begun and holden at the court house in the town of Osceola, Mississippi county, Arkansas, on the 14th day of July, 1884, a regular term of the circuit court of said county, when there was present and presiding the Honorable James G. Frierson, Judge of said court; Ben H. Bacchus, clerk of said court, and William B. Haskins, sheriff of said county, were also present and assisting in the holding of said court; and the court being opened in due form of law by proclamation of the sheriff, the following proceedings were had and duly entered of record, upon the 22d day of July, 1884, the same being a day of said regular term:

State of Arkansas, County of Mississippi:

In the Circuit Court of said county, on the chancery side thereof. The undersigned, Hugh R. McVeigh, substituted commissioner to make report in the case of the state of Arkansas, on the relation of Mississippi county against certain lands and John Crawford, auditor; and appointed to investigate and report as to the acts and doings of Ben H. Bacchus, who was appointed in the original decree the commissioner of the court to execute said decree; but who has been removed for failing to report; does now beg leave to submit the following report, to wit: It appears that on the 4th day of February, 1883, Ben H. Bacchus, late commissioner, offered the following lands for sale, and sold the same under the decree in this cause; and I have placed the names of the purchasers opposite each tract. Said sale being under and by virtue of a decree of the Circuit Court of Mississippi county, Arkansas, rendered at its fall term 1882:

Name of Purchaser.	Pt. Sec.	Sec.	T.	R.	Acres.
John A. Lovewell	fr. all	17	12 N.	12 E.	120
John A. Lovewell	fr. all	18	12 N.	12 E.	35
John A. Lovewell	fr. all	19	12 N.	12 E.	81
John A. Lovewell	fr. all	20	12 N.	12 E.	18

(And a long list of other lands, omitted by the clerk under instructions, as being immaterial to the object and purposes of this transcript.)

Signed: Hugh R. McVeigh,
Commissioner.

State of Arkansas, County of Mississippi:

I, Hugh D. Tomlinson, clerk of the Circuit Court, in and for said county of Mississippi, state of Arkansas, duly commissioned and acting, hereby certify that the above and foregoing seven pages of writing, numbered from one to seven, both inclusive, contain a full, true, perfect and complete transcript of all of the orders, entries and proceedings of record had and made by the Circuit Court of Mississippi county, Arkansas, and by the clerk thereof in the cause pending in said court, wherein the state of Arkansas, on the relation of Mississippi County, was plaintiff, and certain lands in said county, on which taxes were alleged to be due, and John Crawford, auditor, were defendants; showing the filing of the complaint in said cause, the final decree, and commissioner's report; except the long list of lands embraced in said complaint, decree and report, which have been omitted, as set out in the transcript. And I, as said clerk of said Circuit Court of Mississippi County, Arkansas, (further certify that the records in my office fail to show that any warning order was ever entered upon the records of said court) upon the filing of the complaint (or at any other time) filed in said above entitled cause of the state of Arkansas, upon the relation of Mississippi county against certain lands upon which taxes are alleged to be due, and John Crawford, Auditor.

In testimony whereof, I have hereunto set my hand, as said Circuit Court Clerk, and affixed my seal of office, on the 2d day of August, 1884, at office, in Osceola, Arkansas.

(Seal.) Hugh D. Tomlinson,
Clerk of the Circuit Court of Mississippi county,
State of Arkansas.

State of Arkansas, County of Mississippi:

I, William H. Cate, sole and presiding judge of the Second Judicial District of Arkansas, and of the Circuit

Court of Mississippi county, in said state, duly commissioned and acting, certify that Hugh D. Tomlinson, who gave the foregoing certificate, is now and was at the time of signing the same, clerk of said court; and that said court is a court of record, and that his attestation is in due form, and his official acts as such are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand, as such judge, and affixed my seal of office, on this 8th day of August, 1894, at office in Jonesboro, Arkansas.

(Seal.) W. H. Cate,
Judge of the 2nd Judicial Circuit of Arkansas.

State of Arkansas, County of Mississippi:

I, Hugh D. Tomlinson, Clerk of the Circuit Court of Mississippi County, State of Arkansas, duly commissioned and acting, certify that William H. Cate, whose genuine official signature appears to the above and hereto annexed certificate, is and was, at the time of signing the same, sole and presiding Judge of the Second Judicial Circuit of the State of Arkansas, and of the Circuit Court of Mississippi County, in said State; duly commissioned and qualified; and that all his official acts as such are entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in Osceola, Arkansas, on this 10 day of August, 1894.

H. D. Tomlinson,
Clerk of the Circuit Court of Mississippi County Arkansas.

And to the reading of so much of the certificate of the clerk on page 8 of the record as certified that the records in his office failed to show that any warning order was ever entered on the records of said court, the defendant objected upon the ground that the clerk can not certify to what the record does not show, but only to what he copies from the record; which objection was sustained and the plaintiffs excepted. Omitting the part excluded the record was read.

(21) The plaintiff then moved the court to take from the jury the deed of McVeigh as commissioner to John A. Lovell upon the following grounds:

1. On the ground that it appears to undertake to convey land in the State of Arkansas under the authority of the court in the State of Arkansas.

2. No evidence and no proof in evidence that the land was subject to taxation. And the court thereupon withdrew said deed from the consideration of the jury, and the defendant, E. M. Ayres, excepted.

(22.) The plaintiff then introduced David Lawrence, whose testimony was not reported, and has not been filed with the bill of exceptions.

And upon cross-examination the defendant proposed to prove the following with regard to the age of growing timber: After Mr. Ayres and myself had cut the tree spoken of in my examination, and had counted the rings on it, which rings, as I have already stated, were over fifty, and as I stated, something like fifty-five rings, we had some conversation about the age of the tree and about the accuracy of the rings around the tree as indicating the age; and I stated to Ayres that I could settle that, I thought; that in the year 1860, thirty-five years before that, my brother and myself had bored into cotton wood on the main land and on the same character of soil as the island, for water, and when we got all the water we wanted we had plugged up the hole. The witness here explains that there were certain classes of cotton wood trees which woodmen over there knew, which contained quantities of drinking water, and that huntsmen and wood-choppers in very dry weather, when the water was scarce, would bore a hole into one of these trees and get a supply of good drinking water. Witness then said I said to Ayres, I could find that tree and if it showed that where we had bored into it had growed up, I could cut into where we bored the hole and count the number of rings on the chip, and thereby show the accuracy or inaccuracy of the rings on the tree showing the age of the tree. I found the tree. I cut into it where it had grown over the place where I had bored into it thirty-five years ago, and I found just thirty-five rings on the chip.

Counsel for Ayres said they offered this evidence, first, to show that the witness, Stewart, was not accurate in his testimony as applied to cotton wood timber when he said the concentric circles in a tree were no accurate test of their age. Second, to show the accuracy of this test as to the age of cotton wood timber.

Which testimony was objected to by the plaintiffs on the ground that it was incompetent and irrelevant in this case, which objection was sustained, and the defendant, Ayres, excepted.

(23). The plaintiff, by way of rebutting testimony, then examined E. C. Cooper, as follows:

Examination by Mr. Randolph.

Q. Your deposition has been read in this suit and you remember to have given it at Osceola some months ago?

A. Yes, sir.

Q. Do you know that island on which Hipp lived?

A. Yes, sir.

Q. Is the island on which that house stood in existence now?

A. It has caved in.

Q. When did it cave in?

A. I don't remember, but the last time I was on that side of the island it was about a couple—well, I forget, but that has been gone long years ago.

Q. Been gone a long time?

A. Yes, sir; that old island caved in a long time ago, and the house went, too.

Q. How long ago was that?

A. Well, the first time I ever saw the Hipp house was in the winter of 1854. You will find it in my deposition.

Q. Now how long after 1854 did the main land on which the Hipp house stood disappear?

A. I can't be positive, but the first time I ever saw the bank it was in a caving condition, and it kept caving and caving and the island kept on caving until 1867.

Q. In the meantime had that house gone?

A. Yes, sir; I expect the house left there in 1864.

Q. There has been no house there since?

A. No, sir.

Q. Now, how far beyond the house did the caving continue?

A. I don't know as I understand you.

Q. How far outside of the Hipp house did it go towards the Tennessee shore. From where the Hipp house was over to the Tennessee shore? I mean on the north side of the island about 600 yards across there? How much caving beyond the Hipp house was there?

A. It all caved from the Hipp house and from the river back to the Tennessee shore.

Q. Well, 600 yards?

A. That is my idea. I went hunting in there a great deal.

Q. It was a great place for ducks?

A. It was low and growed up with little willows and cotton woods, and was a great place for killing ducks in the fall and spring.

Cross-Examination by Judge Heiskell.

Q. Mr. Cooper, when did you say that Hipp house was caved away? In 1864?

A. I think it was about that time. It was there in 1862, and then it was there in 1863, and my recollection is that it was 1864.

Q. Where was it?

A. The Hipp house?

Q. Yes, sir; with reference to the lower end of Crutcher Lake?

A. Crutcher Lake? Well, I had no compass, but it was in a southwesterly direction.

Q. It was towards the Tennessee shore?

A. No, sir; the Arkansas shore.

Q. From the lower end of Crutcher Lake a southwesterly direction?

A. Yes, sir.

Q. How far from the lower end of Crutcher Lake was the Hipp house?

A. When I knew it?

Q. Yes.

A. About 600 yards.

Q. Your idea is that this house washed away in 1864, not before that?

A. No, I don't think it did. I was there in 1862 and I was there in 1863 when the Federals held Ft. Pillow.

Q. Were you there when Forest came?

A. I was there.

Q. In 1854, when you first knew the island, how far down did it extend towards Coal Creek?

A. It went below Coal Creek.

Q. Old river in 1854 from the mouth of Coal Creek, where did it empty into the river, it was a stream then? In other words it extended you know where the Polsdofer grant fronts on the old bank of Tennessee?

A. Do you mean that 5000 acres?

Q. Yes; did it extend below that?

A. Yes, sir.

Q. And above that in 1854?

A. Yes, sir. I reckon the island extended there, and it caved into the main shore there at Ft. Pillow, and Coal Creek sorter run out something like Wolf river.

Q. It was all along from the mouth of Coal Creek to the Polsdofer grant and the Williams 400 acres and the Hobbs 400 acres?

A. I don't know nothing about the Hobbs 400 acres.

Q. That line south of the 5000-acre grant?

A. Now, here, I don't know where this 5000 acres on the east side of Coal Creek ran, but it runs up Coal Creek.

Q. This Hobbs tract goes in below it.

A. I don't think Hobbs had any tract.

Q. Your idea is that the Hobbs 400 acres doesn't front on Old river at all?

A. I don't think it does. If it's on a stream its there

on Old river. I have been a timberman, and Hobbs came from Ripley to show me the location to put this mill.

Q. Hobbs did that?

A. Yes, sir.

Q. And you put the mill there?

A. No, sir; there used to be an eddy in Hepright Pocket, and he put the mill at the mouth of Old river, and then moved it up to Coal Creek.

Q. Where was the main channel of Mississippi river in 1854?

A. On the Arkansas side.

Q. Now, in 1854, where did Old river run?

A. Well, it just run along the bank.

Q. On up to the original Tennessee shore?

A. Yes, sir.

Q. How large was it?

A. In 1854, 400 yards wide.

Q. How far did it extend?

A. Way round and up to what is known as the Friend place. It was three-quarters of a mile wide in some places, and in other places a mile wide.

The Court:

Q. Can you tell us when the last time was that steam boats run on that side of the river?

A. No, sir. I have known boats to come up this chute.

Q. In 1854 what was the size of the timber down at the lower end opposite this 5000 acres?

A. I don't know that I ever examined the timber at the lower end, I did at the Hipp house; I took a contract in the summer to go down and cut timber on the 1000 acres for Hobbs.

Q. What size was the timber?

A. About two and a half and three feet.

Q. What was the character of the timber?

A. Some box elder and some ash, I reckon.

Re-cross examination by Mr. Randolph.

Q. When was it Hobbs put that mill there?

A. I declare I can't tell you.

Q. How many years ago?

A. I don't remember the date.

Q. He first put it down at the mouth of Old river?

A. Yes, sir.

Q. Where did he put it afterwards?

A. I think he cut another space. I don't know whether it was Polsdofer or him, but I think it was Hobbs put it up there at Coal Creek.

Q. Do you know whether that was when Marley sold to Polsdofer?

A. Yes, sir; I think Williams and Hobbs got the timber land from Marley, and then Hobbs, after they were through with the land, it fell back to Williams and Marley by some means or other.

Q. Then they sold to Polsdofer?

A. Yes, sir.

Q. This mill was located where?

A. The mill was put down to the bank of Old river, and then it was moved up there and they got it, and then it was moved again.

Q. And Hobbs had it there before he sold to Polsdofer?

A. I think so.

Judge Heiskell:

Q. How far was this first location from the Mississippi river?

A. It was a short distance.

Q. Then how far was it where it was placed finally?

A. Something near a half mile.

The Court:

Q. Did the main channel of the Mississippi ever run in Old river in your recollection?

A. Not in my recollection.

Q. When did you first know that country?

A. In 1854.

(Judge Heiskell):

Q. I understood you to state that the island, in 1854, ran down in front of Ft. Pillow?

A. It did, sir.

(23 1-2). Marley recalled by the plaintiff. (By consent.)

Examination by Mr. Randolph.

Q. There is an old deposition you gave in this Hunter and Fry case. I wish you would look at it?

A. This is a lease I gave McCabe the 2nd of February, 1881.

Q. Did he go on the land?

A. Yes, sir.

Q. How long did he stay there?

A. A year or so, until the time was out.

Q. Did you ever know anything about Ayres being in possession of any part of this island?

A. I was told after I sold the timber and put my man in possession of it, he told me that Ayres sent some men

down there and said he owned it. And I was advised to see about it. And it came up in Ripley and—

Q. And you told him the suit was to come off?

A. I suppose so.

Q. And the suit did come off? Is it the only time you ever knew Ayres or anybody else to be in possession down there or had any claim against you?

A. Yes, sir.

Q. Nobody else? And you had possession?

A. No, sir; I didn't have much possession.

Q. You put Hobbs in there?

A. Yes, sir.

Q. And that was the only trouble you had about this property?

A. Yes, sir; and then my men went on the land and the only trouble I had was what this man told me.

Q. And that was while the contract you had was in existence?

A. Yes, sir.

Q. And the suit came to an end?

A. Yes, sir.

Cross-examination by Judge Heiskell.

Q. You had some controversy about some timber, didn't you?

A. Sir.

Q. Didn't you have a contest before Coleman?

A. No, sir.

Q. Didn't you take this deposition?

A. I don't know whether I did or not, I don't recollect. I gave my deposition in Hunter and Fry case.

Q. Didn't you bring this ———, isn't this the deposition you have before Squire Coleman?

A. I asked him if I didn't have to take those depositions.

Q. Well, are these the ones?

A. Yes, sir; these seem to be in my handwriting.

Q. Then the fact is there was another contest? Outside of the one you stated to Mr. Randolph?

A. This was in 1891.

Q. I understand. That is before this?

A. Yes, sir.

Q. You weren't on that island at all after 1890? After the time Mr. Hobbs was in possession?

A. Oh; yes, sir.

Q. How often were you on it?

A. Two or three dozen times.

Q. How far up?

A. I don't recollect.

Q. When was the last time you were on the portion you sold Hobbs the timber off?

A. I don't recollect.

Q. You say you made a contract with McCabe? Do you know that he went on it at all?

A. I saw his cabin.

Q. You don't know whether he stayed in there a year or not? Don't you know the time they run him out?

A. No, sir.

Q. When was that, in 1881? Have you the tax receipts?

A. I have them at home.

Q. Can you get them here by to-morrow?

A. I don't know that I could, but I will state this, that the land was simply listed me as 5000 acres.

Q. That is what I wanted to get at. That is because of your grant on the Tennessee side?

A. Yes, sir.

Q. And you have never paid a cent of taxes on the accretion?

Re-cross examination by Mr. Randolph.

Q. The calls of the grant are not given on the assessment?

A. Yes, sir.

Q. Just number so and so by the State of Tennessee?

A. It was listed me as 5000 acres.

(Judge Flippin.)

Q. State where is the head of Crutcher Lake?

A. Across from the foot of Yankee Bar.

(24) He also introduced and read the Act of 1881 of the State of Arkansas, Chap. 39, page 63, and the various constitutions of Arkansas and treaty between France and the United States ceding the Louisiana Territory, all of which by agreement of counsel are not to be copied in the bill of exceptions but are to be read on the hearing of this cause in the appellate court from the printed copies thereof in Sandel's & Hill's digest of the statutes of the State of Arkansas.

This was all the testimony. The cause was then argued to the jury. The court gave peremptory instruction to the jury as follows:

Judge Hammond's Charge.

The motion of the plaintiff to direct a verdict in his favor is granted, and you will allot to him, by your verdict, all but only that portion of the land described in the declaration, which is included within the lines to be ascertained by extending the side lines of the Woodfork grant and the Marley deed from the points where they strike the original river front, known in the proof and the maps in evidence as "Old river," not in the direction of their original course, but as nearly as practicable, at right angles with the present course of the Mississippi river to the thread of its main channel.

This rule of admeasurement of the accretions to the original grant is adopted by the court from the case of Miller vs. Hepburn, in the Kentucky Court of Appeals, 8 Barh, 326, for the reasons stated by that court, as more applicable to the conditions found on our inland rivers at places like this than the rule of Deerfield vs. Ames in the Supreme Court of Massachusetts, 17 Pick, 41, applied to places on the seashore or in tide water rivers where the tide ebbs and flows, or to sheets of water like our great lakes, to which the Massachusetts rule was found applicable in Jones vs. Johnstone, 18 How. 150, 157, and Johnstone vs. Jones, 2 Black, 209, 222.

It is announced by the Supreme Courts, both of Massachusetts and the United States, that the rule of those cases "May require modification, perhaps, under particular circumstances," and the modification made by the Kentucky court suits the conditions found in the Ohio and Mississippi rivers, in my judgment, better than the other.

It should be explained that the court here does not require the extended lines to stop at low water mark in an ordinary stage of the river because it is not necessary either to adjudicate that question nor to concern ourselves with it in this admeasurement. It is no concern of the defendants. If the state now owns the space between low water mark and the thread of the present main channel, this judgment does not at all affect the title of the state to that space as between it and the plaintiff, Polsdorfer, who can be made to surrender it at the demand of the state.

If, however, the original grant of the state conveyed that space to Woodfork, the grantee, subject to whatever governmental or paramount control either the State or the United States holds in trust for the public protection of navigation, then, the plaintiff as the successor in title

of the original grantee of the State, has a right to go with these extended lines to the thread of the stream, as a matter of property right or title. But if the original grant of the State has not conveyed the State's proprietary right as contradistinguished from its governmental right, held in trust for the public, still, the plaintiff Polsdorfer, has a right of access to the thread of the stream as a right of property, appurtenant to his original estate by the grant, or else he has a license from the State, by virtue of the grant or common usage to use the space between low water mark and the thread of the stream, until the State demands possession of that space for the public use or for its proprietary ownership and control. Precisely, as the paramount right of the United States, in its trust capacity for the public use of navigation, may demand possession or exercise control of every foot of navigable water, its beds and banks, on this and all other navigable rivers within the jurisdiction. Either the State or the United States may exercise such governmental control; and the state, if it has any proprietary or property right left since its grant of Woodfork and his successor, Polsdorfer, can recover it from him, but the defendants can not assume to enforce the State's right or disturb Polsdorfer's possession, acquired or usurped under his grant.

Again, if the court has by this direction for the admeasurement of the accretions belonging to Polsdorfer made a mistake and granted him too much he may now or on error declared, remit the excess; or if too little has been assigned him, he may, on error, correct the measurement, either that above or that below low water mark.

Best That Can Be Done.

This is the best that can be now done, in the condition of the proof, no surveys having been made of these accretions adequate to the purpose of accurately determining the quantity to be measured by your verdict. If the plaintiff and the defendants, represented by Judge Flippin, Price and Roy, I believe they are claiming adjoining lands and their accretions can not agree on the measurements or lines hereby directed, you will not be discharged from the further consideration of this case but held together until the court, at the expense of the parties, can have surveys made from which, upon their evidence, the precise form of your verdict may be ascertained or directed.

The motions of the defendants, respectively, to direct a verdict in their favor are overruled, except so far as

this judgment goes, and requires them to reserved until the agreement of the parties on the surveys to be made shall establish the extended lines and thereby indicate, how much, if any, of the land sued for by the declaration does not belong to the plaintiff, Polsdorfer.

The court may say that in its judgment the defendants have too much restricted the law of alluvion, and jus alluvionis of the common law, which is our law for this case, the law established by the Supreme court of the State of Tennessee. Seemingly, the learned counsel put too much stress upon the too constant use and appearance of the word "accretions." The increment of the sea or rivers called "alluvion" or "accretions" is not, in any legal sense, the fruit of the land, like apples growing from a tree, or a fungus on plants, but it is the fruit of the waters, projected and lodged against the land, and goes to the riparian owner of the land, rather by reason of his ownership or right to that which floats or swims in the water flowing about his land than from the ownership of land itself, if there be any distinction between the two. Possibly it may be better taken to be the offspring of both water and land, each being a kind of parent in the process of propagation. But certainly alluvion is not confined by the law to that which grows out of the land or limited in the narrow way urged by counsel to that which accretes to the border without coming from afar off. Alluvion may, and often does, comprehend islands, popularly so-called, which stand off or appear in front of the riparian land and become "accretions" thereto by the filling up of the intervening spaces, and the alluvion in between is accretion to the land and not accretion to the island. It depends on the particular facts. So, accretions may come to the riparian owner by a recession, withdrawal, retreat or reliction of the waters. Whatever the process or the combination of processes, if they be gradual and imperceptible, in sense of the law, the alluvion belongs to the riparian owner. It is wholly immaterial, if the process be gradual and imperceptible, that some parts of the alluvion may be identified as belonging to some former and far away or nearby owner of the same soil which has been projected or filled in by the imperceptible process. The alluvion belongs none the less to the riparian owner to whose land it has become attached by that imperceptible process of projection or accretion.

The Avulsion Law.

If the process be that of avulsion the rule is different; then it does not belong to the riparian owner; no matter to whom else it may belong, it does not belong to him. The process of avulsion is the opposite of that of accretion. If the increment comes of sudden changes, either those of projection or reliction, it is avulsion. If you can see the process going on, whether violent or not, it is avulsion, but if you can not see it the process is accretion, and the incremental product is alluvion. It all depends on the nature of the process. There is not a particle of evidence in this case of any avulsion, and, therefore, the increment belongs to Polsdorfer as riparian owner.

"Like the statute of limitations, this law of alluvion, as between States and nations as well as private owners, is a law of repose. From the day of Bracton, who got it from the institutes of Justinian, to this day, treaties, acts of parliament, judgments of the house of lords and other courts in the mother country, our congress, the legislatures of the States, the Supreme Court of the United States and of the State of Tennessee, have approved the rules laid down by Bracton on the law of alluvion as essential to the peace of nations and the repose of society among its individual owners of land. The rule was established and it maintained to forbid the disturbance of the possession of alluvion by just such evidence, inconclusive and inconsequential, as the defendants have offered in this case. Disputants are not allowed to go about the identification of the particles of soil composing the alluvion in order to claim it, as one would the flesh marks of horses or mules, the identity of which comes in question. The only inquiry permitted is that as to the process by which the changes have been made, whether it be a sudden or an imperceptible one. No sudden process being proved in this case, the State of Tennessee and Polsdorfer are entitled to this 'Flower Island' we see on the river map which is in evidence. The State of Tennessee, politically, by a possible, though not at all clearly proven, shifting of the boundary line between Arkansas and Tennessee; Polsdorfer by the State's grant in 1837 as the proprietor of the bank and by the imperceptible accretion thereto of this alluvion called Flower Island. For this reason I have directed your verdict, because all the defendants prove being true, this result nevertheless must follow. Ordered accordingly."

To which the defendant, Ayres excepted and the other defendants excepted.

The defendant, Ayres, requested the court to charge as follows:

I. In the action of ejectment the plaintiff relies for a recovery upon the strength of his own title and not upon the weakness of defendants' title, and can only recover in case he shows to your satisfaction a legal title to land in controversy. In order to defeat the plaintiff's action it is not necessary that defendant show that he has a title. The plaintiff can not recover if the defendant show any of the following propositions: (1) If defendant show that neither he nor plaintiff have any title the plaintiff can not recover and your verdict should be for the defendants. (2) If the defendants show the title to the property is in some third party the plaintiff can not recover and your verdict, will be for the defendants. (3) If the defendants show that they or either of them have title to the property in controversy the plaintiff can not recover and you will find for the defendants.

The plaintiff exhibits to you a grant from the State of Tennessee to his grantor Marley for 5000 acres of land in Lauderdale county, Tennessee, and also a deed for 400 acres from Williams also in Lauderdale County, Tennessee, and he claims that Flour Island, the land here in controversy, is accretion to these two tracts of land; in other words, accretion to the Tennessee shore and therefore that he has a legal title to the land.

On the other hand the defendants says: (1) First that the land in controversy is not accretion to the Tennessee shore at all but is accretion to Flour Island and that this island belongs to Arkansas and is a part of Mississippi county, Arkansas, and that even if this accretion extended by degrees until it reached the Tennessee shore the plaintiff acquired no title to it; and if you find this from the testimony you will find for the defendants. (2) Defendant claims if the evidence show that Flour Island is within the bounds of Tennessee and that that island was not all washed away and that with all the changes in it from 1832 on, a part of it remained and that the land here in controversy accreted by degrees to this island until it finally reached the Tennessee shore, the plaintiff has no title and can not recover; and if you find this state of facts even though you should find that neither of defendants had title to any part of the island or its accretions you will find for the defendants, for, in this state of facts the property would belong to the state, and not to the plaintiff by accretion to the Tennessee shore. (3) The defendant Ayres, claims that the plaintiff is estopped to set up any title to this island.

On this point I charge you, that if you find from the testimony that while Lovewell claimed Flour Island he had a controversy with Marley about its ownership and as to which of them $80.00 the price of timber cut by - - belonged and that they finally agreed that if Lovewell would let Marley have this $80.00, Marley would give up all claim to the island, as it then was, and this was agreed to by Marley and Lovewell, though not in writing and you further find that before Ayres bought Lovewell told him about this settlement, I charge you that this constitutes an estoppel against Marley and all claiming under him, and as the plaintiffs claim through a deed from Marley this would constitute an estoppel against the plaintiff. And in this event you will find for the defendants even if you should find that the land in controversy was accretion to the 5000 acre Marley tract.

Authorities, 85 Tenn. 154; 92 Tenn. 348; 98 Tenn. 561; 100 Tenn. 150; 2 W. & Meig's Dig., p. 1492; 23 S. W. 100; 36 S. W. 233; 61 Mo. 347; Land on Waters, Sec. 166 and cases in 112; 29 S. W. 661; 78 Col. 634; 61 Ark. 429; 137 U. S. 226.

II. There is not in this record on scintilla of proof that from 1823 up to the present time there has been a particle of accretion to the Poldorfers' lands either in front of the Marley tract of 5000 acres or in the Williams tract of 400 acres; and that being 50, there is not a particle of proof in this record to sustain the plaintiff's contention and the court should direct the jury to find for the defendants.

III. If you find from the testimony that fractional sections 17, 18, 19 and 20 was an island in the Mississippi river and that that island was sectionized by the United States Government as belonging to Arkansas, that it was entered by Hardiman and by Barnes as Arkansas land and granted by the United States to these parties as Arkansas land; that taxes were assessed and collected on these sections as Arkansas land, the court charges you that this island was a part of Mississippi County, Arkansas. And if you further find that the land here in controversy was accretion to this island then the plaintiffs can not recover, and you will find for the defendants.

IV. If the jury find from the evidence that the island spoken of in the above instruction entirely washed away and then another island was formed in the Mississippi river, whether that island reformed on the Tennessee or the Arkansas side of the Mississippi river; and the jury further find that the property here sued for was formed to this island— that is was accretion to this island, and

not accretion to the Marley or Williams' tracts of land—that is, if they were not accretions to the Tennessee shore, they will find for the defendants.

V. If the jury find from the testimony that the channel of the Old river was always and is now along the original bank of the Mississippi river on the Tennessee side of the river and that this land here in controversy formed on the Arkansas side of said Old river, the court charges you to find for the defendants.

VI. If the jury find from the testimony that the land here in controversy did not by imperceptible degrees form on the front of Polsdorfer's land on the Tennessee shore that is, if they find that the land here in controversy was not accretion to the Tennessee shore they will find for the defendants.

VII. If the fact is established that the land claimed by the defendant Ayres was surveyed in 1823 as part of the territory of Arkansas and that at that time and in 1837 when the Woodfolk grant issued the main channel of the Mississippi river was on the east side of that island it would be first U. S. land, and then on the admission of Arkansas it would belong to and become part of the State of Arkansas. If about the years 1839-40 or at any other time the main channel of the Mississippi shifted from the east side of that island to the west side, the title of the island as part of the state would not be affected by that change but the island would remain part of Arkansas. If the law is that when the river shifted from the east to the west side of the island containing the four sections of Troy township in Arkansas the boundary became fixed at the then center line of the abandoned channel no more to be affected by accretion or reliction or otherwise as between the state, then I ask the court to charge that each state had title from that time to that line and when the channel filled to that line the land west of that line was Arkansas and that east was Tennessee.

VIII. If the line between the states become fixed to a certain point at the time of the cut-off then I ask the court to charge that when the accretion from the Arkansas island reached that point any accretion on the bed of the Old river east of that fixed line would be on land belonging to Tennessee under the water and could not become the land of Polsdorfer while wholly separated from it by the ungranted land belonging to the state lying in the bed of Old river—neither could it afterwards when met by accretion from the Tennessee shore suddenly become all his to that line between the states.

IX. If the process of filling that channel, the accretion from the Arkansas shore reached and crossed that line while there remained a body of water over that portion of the bed of the river which belonged to Tennessee as ungranted land then that land at the time became by that cut-off all at once the property either of Polsdorfer or else it remained the property of the state as ungranted, just as it was ungranted state land before that cut-off. If that be the law I ask the court to charge that Polsdorfer can not acquire title from the state by the sudden change of the river from one side of the island to the other, any more than Tennessee can acquire title to the island by the sudden change of the main channel from the one side to the other. The title to the bed of the stream having been before the change the property of the state as ungranted land remains after the sudden change the property of the state as ungranted land and does not become by the sudden change the property of Polsdorfer. In other words, if the state could not acquire the title to the island by the change, so Polsdorfer could not acquire the title to the bed of the channel by the sudden change.

X. I ask the court to charge that when the land in the bed of the Old channel by the change became no longer navigable it became so with the title to it vested in the state as ungranted land. If the state was the owner of both sides of the pond or lake, the lake would be subject to the law of accretion and the owner of one side of the lake would have the same right to the accretions to his shore as the owner of the other side. If the respective owners were states the same rule would apply and the accretion to Arkansas would be as much hers as those to Tennessee would be hers.

XI. If the jury should find from the testimony that fractional sections 17, 18, 19 and 20 were in 1823 and on up to 1839-'40 an island in the Mississippi river, whether on the east or west side of the middle thread of the Mississippi at that time and that about in 1839 or 1840 or after the waters running between the island and the Tennessee shore suddenly changed the course and so suddenly changed to the Arkansas side of the island as to make the bottom of the river between the island and the Tennessee shore dry land, then this land would be what the law denominates reliction or relicted land and would not belong to the shore owner on the Tennessee shore, but that part of it on the west side of middle stream of Mississippi would belong to Arkansas and not to the owner of the island and that part of the reliction on the east side of

the middle stream of the Mississippi would belong to the state of Tennessee and not to the Tennessee shore owner. In neither of these events could Mr. Polsdorfer recover in this suit and the verdict should be for the defendants.

All of which was refused and this defendant excepted.

The other defendants asked the court to charge as follows:

a. If on a full consideration of this case you are not satisfied that the lands claimed by the defendants are within the bounds of the plaintiff's original grants or deeds or accretions to them then you will find for the defendants.

b. If the court holds that upon the shifting of the main channel the line below the states became fixed, then the accretions from the Arkansas shore when they reached that fixed line and crossed it would become Tennessee territory and if the law of Tennessee authorized the grant of such lands would be grantable by the official of Tennessee; and if granted would become the property of the grantee, and he would be entitled to the imperceptible accretions in his front until they met the original line of the grantee on the other side of its accretions, and when the accretions met those accretions to the west side would not at the time of the meeting of the accretions suddenly be divested out of the island proprietor and vested in the mainland proprietor Polsdorfer.

c. If the law did not authorize the grant of such land or if it remained ungranted the title to the bed of the old channel and the accretions on the west side would remain in the state subject to the right of the legislature to make it grantable and the execution to grant it until it met Polsdorfer's grant or its accretions. And it would not then be suddenly divested out of the state as grantable land and vested suddenly in the hands of Polsdorfer.

d. If an island or other immovable body of land is located in from the riparian owner then accretions may be formed from said owners' land to the island or other body of land, but it can not be said that the immovable land has accreted to that of the riparian owner for the reason that accretions are made up from the materials of floating, movable bodies but not made from the materials of fixed, immovable bodies.

e. Peremptory instructions asked for defts. Roy.

Counsel for defendants Roy asks for a peremptory instruction in their favor and against plaintiffs as to the land embraced in their grant read on the trial of this case upon the ground that the undisputed proof shows

that this land is west of the western boundary of plaintiff's land and can not be accretions in front of his land even if an accretion to the Tennessee shore.

f. Peremptory instruction asked for deft. Price.

Counsel for defendant Price asks for a peremptory instruction in his favor and against plaintiff as to so much of the land embraced in the Price grant introduced in evidence in this cause which lies west of the western boundary line of plaintiff's land when extended in a southernly direction across the Price grant to his southern boundary upon the ground that if this land is an accretion to the Tennessee shore it is not in front of plaintiff's land but to the west of his front.

g. Counsel for defendant, Price, moves for a peremptory instruction in his favor and against plaintiff as to the remainder of the land embraced in his grant sued for in this action which lies south and west of Old River for the reason that the proof in the elevation of this land in the growth of its timber and in the quantity of water in Old River at this date and otherwise conclusively shows that this land is not an accretion to plaintiffs' land which lies across and on the opposite side of Old River.

h. As to the agreement of Price with Marley read in evidence, Marley, by virtue of this, acquired no other or additional rights to those he already had, and could communicate none other by reason of this agreement to the plaintiff when Marley sold to him. That agreement resolved itself into this, that if the land covered by Price's grant was an accretion to Marley's land, when so ascertained, then Price would quit claim the same to him.

i. Instructions for Price and Roy.

1. Accretions are gradually and imperceptibly formed from the water on contiguous land by precipitating upon the adjacent land the soil, sand, sediment and vegetable matter held in suspense or solution. 23 Wallace, 46.

2. Accretions, properly speaking, commence at the bank and extend from the bank outwards in front of the riparian proprietor. County of Clare vs. Lexington, 23 Wall. U. S. 46; Posey v. James, 7 Lea, 98.

3. If the riparian owner has accretions upon his front extending outwards, and these meet accretions from some island or other land, then the line at which these accretions meet, the point of contact, will determine the extent of the proprietorships of the accretions of the respective owners.

4. If, in this case, you find that the accretions in the Price grant formed upon the west bank of Old River be-

fore accretions from plaintiff's land reached that point, the west bank of Old River, then the Price grant land, is not an accretion to the plaintiff's land, and plaintiff can not recover in this action.

5. If you find that the Price grant land is made up of accretions from some source, and that these reached the west bank of Old River at the same time that the accretions, if any, from the plaintiff's land reached the west bank of Old River, that being the point of contact, then plaintiff can not recover.

6. Plaintiff can only recover the accretions, if any, in front of his own land, but not those in front of the lands of others.

7. The land embraced in the Roy grant, even if found to be accretions from the Tennessee shore, can not be recovered by the plaintiff in this suit if you find it west of the extreme west line of plaintiff's land and not in his front.

8. Nor can the plaintiff recover that portion of the Price grant, even if accretions from the Tennessee shore, which you find lies west of the west line of plaintiff's land when extended in a straight line across the Price grant to the Southern boundary.

9. You will designate in your verdict what portion of the Price grant, between what lines on the map, if less than the entire grant, you may find in favor of Price.

10. If you find that the Price grant covers alluvion land and that this land had formed upon the west bank of Old River before accretions, if any, from the plaintiff's land had crossed Old River, then plaintiff can not recover for in that event the alluvion land would not be an accretion to plaintiff's land.

Which the court declined to give and the defendants excepted.

Under the above peremptory instructions the jury found for the plaintiffs.

The defendants made a motion for a new trial, which was refused, and the defendant, E. M. Ayres, tenders this bill of exceptions to the judgment of the court overruling the motion for a new trial, which he prays may be signed, sealed and made a part of the record, which is accordingly done.

Hammond, Judge. (Seal.)

Circuit Court of the United States, Western District of Tennessee.

J. H. Polsdorfer et ux.,

vs.

J. C. Marley et al.

No. 3491.

Assignment of Errors. Filed Mch. 12, 1900.

Assignment of errors on behalf of appellant, E. M. Ayres.

1. The court erred in giving a peremptory instruction to find for the plaintiff, which he did in these words: "The motion of the plaintiff to direct a verdict in his favor is granted." The court then went on with directions as to details of the verdict.

There was not only evidence that should have been left to the jury, but there was an overwhelming weight of evidence to show that the land sued for was not accretion to the appellee land. And a verdict for the appellee was erroneous.

2. The court erred in excluding the plat from the officer of the Commissioner of State Lands at Little Rock. That was an office paper. S. & H. Ark. Digest of Statute, Sec. 4476, 4479 and 4484, 4486. This paper was properly certified by the authorities under the Statute of the United States.

It is evidence that the land in controversy was a part of the State of Arkansas. It is evidence of the claim of the State of Arkansas that it was part of her territory.

3. The court erred in refusing to appellant the benefit of the record of the Circuit Court of Mississippi County, Arkansas, showing the sale of the four fractional sections, 17, 18, 19 and 20, to John Lovewell, appellant's grantor. If valid it was evidence of title; if invalid it was evidence of the jurisdiction by the State of Arkansas over the property in controversy in this cause.

4. It was error to exclude the commissioner's deed to the same land to John Lovewell. It was a deed valid upon its face. S. & H. Arkansas Digest, Sec. 6623.

No proceeding to attach was filed within two years. Ibid, 6634.

The supposed defect in failing to record the warning order with the deed, is cured by the Act which provides and cures defects, which do not go to the jurisdiction of the court. The deed is evidence to fix the character of acts of ownership proved to have followed and to define

the locality. It is an official assertion of territorial jurisdiction of the State of Arkansas.

5. The court erred in refusing to charge as appellant requested as follows:

J. H. Polsdorfer et ux.,

vs.

J. C. Marley et al.

Instructions asked by defendant, E. M. Ayres:

In the action of ejectment the plaintiff relies, for a recovery, upon the strength of his own title, and not upon the weakness of deft's title. And can only recover in case he shows to your satisfaction a legal title to land in controversy. In order to defeat the plaintiff's action it is not necessary that the defendant show that he has a title. The plaintiff can not recover if the defendant show any of the following propositions:

(1) If deft. show that neither he nor plaintiff have any title the plaintiff can not recover and your verdict should be for the defendants.

(2) If the defendants show the title to the property is in some third party, the plaintiff can not recover, and your verdict will be for the defendants.

(3) If the defendants show that they or either of them have title to the property in controversy, the plaintiff can not recover, and you will find for the defendants. The plaintiff exhibits to you a grant from the State of Tennessee to his grantor, Marley, for 5000 acres of land in Lauderdale Co., Tennessee, and also a deed for 400 acres from Williams, also in Lauderdale Co., Tennessee, and he claims that Flour Island, the land here in controversy, is accretion to these two tracts of land; in other words, accretion to the Tennessee shore. And therefore that he has a legal title to the land.

On the other hand, the defendant says:

(1) That the land in controversy is not accretion to the Tennessee shore at all, but is accretion to Flour Island, and that this island belongs to Arkansas, and is a part of Mississippi Co., Arkansas, and that even if this accretion extended by degrees until it reached the Tennessee shore, the plaintiff acquired no title to it. And if you find this from the testimony, you will find for the defendants.

(2) Defendant claims if the evidence show that Flour Island is within the bounds of Tennessee, and that that

Island was not all washed away, and that with all the changes in it from 1832 on, a part of it remained, and that the land here in controversy accreted by degrees to this island, until it finally reached the Tennessee shore, the plaintiff has no title and can not recover, and if you find this state of facts, even though you should find that neither of defendants had title to any part of the island, or its accretions, you will find for the defendants; for in this state of facts the property would belong to the state, and not to the plaintiff by accretion to the Tennessee shore.

(3) The deft., Ayres, claims that the plaintiff is estopped to set up any title to this island. On this point I charge you, that if you find from the testimony that while Lovewell claimed Flour Island he had a controversy with Marley about this ownership, and as to which of them $80.00, the price of timber cut by Petty, belonged, and that they finally agreed that if Lovewell would let Marley have this $80.00 Marley would give up all claim to the island as it then was, and this was agreed to by Marley and Lovewell, though not in writing, and you further find that before Ayres bought, Lovewell told him about this settlement, and that Ayres bought relying in part on this settlement. I charge you that this constitutes an estoppel against Marley and all claiming under him, and as the plaintiffs claim through a deed from Marley, this would constitute an estopped against the plaintiff. And in this event you will find for the defendants, even if you should find that the land in controversy was accretion to the 5000 acre Marley grant.

(1 Page.)

Authorities: (1) 85 Tenn. 154; 92 Tenn, 348; 98 Tenn. 561; 100 Tenn. 150; 2 W. & Meigs' Dig., p. 1492; (2 page) (and 3 page) 23 S. W. 100; 36 S. W. 233; 61 Mo. 347; Land on Waters, ss. 166 and cases in 42, 29 S. W. 661; 78 Col. 634; 61 Ark. 429; 137 U. S. 226.

(1) E. M. Ayres asked the following:

There is not in this record one scintilla of proof that from 1823 to the present time there has been a particle of accretion to the Polsdorfers' lands, either in front of the Marley tract of 5000 acres or in the Williams tract of 400 acres. And that being so, there is not a particle of proof in this record to sustain the plaintiff's contention and the court should direct the jury to find for the defendants.

(2) If you find from the testimony that fractional sections 17, 18, 19 and 20 was an island in the Mississippi

River, and that that island was sectionized by the United States government as belonging to Arkansas; that it was entered by Hardiman and by Barnes as Arkansas land, and granted by the United States to these parties as Arkansas land; that taxes were assessed and collected on these sections as Arkansas land the court charges you that this island was a part of Mississippi County, Arkansas. And if you further find that the land here in controversy was accretion to this island, then the plaintiff can not recover. And you will find for the defendants.

(3) If the jury find from the evidence that the island spoken of in the above instruction entirely washed away, and then another island was formed in the Miss. River, whether that island reformed on the Tennessee or Arkansas side of the Mississippi river, and the jury further finds that the property here sued for was formed to this island; that it was accretion to this island, and not accretion to the Marley or Williams tracts of land, that is if they were not accretions to the Tennessee shore, they will find for the defendants.

(4) If the jury find from the testimony that the channel of Old River was always and is now along the original bank of the Mississippi River, on the Tennessee side of the river, and that this land here in controversy formed on the Arkansas side of Old River, the court charges you to find for the defendants.

(5) If the jury find from the testimony that the land here in controversy did not by imperceptible degrees form on the front of Polsdorfer's land on the Tennessee shore; that is, if they find that the land here in controversy was not accretion to the Tennessee shore, they will find for the defendants.

Instructions asked by J. B. Heiskell:

If the fact is established that the land claimed by the defendant, Ayres, was surveyed in 1823 as part of the Territory of Arkansas, and that at that time and in 1837, when the Woodfolk grant issued, the main channel of the Mississippi River was on the east side of that island, it would be first U. S. land and then on the admission of Arkansas it would belong to and become a part of the State of Arkansas.

If, about the years 1839-40, or any other time, the main channel of the Mississippi shifted from the east side of that island to the west side, the title of the island as part of the state would not be affected by that change, but the island would remain part of Arkansas. If the law is that when the river shifted from the east to the west side of the island containing the 4 sections of Troy

Township, in Arkansas, the boundary become fixed at the then center line of the abandoned channel, no more to be affected by accretion or reliction or otherwise as between the states, then I ask the court to charge that each state had title from that time to that line, and when the channel filled to that line, the land west of that line was Arkansas and the east was Tennessee. If the line between the states became fixed to a certain point at the time of the cut off, then I ask the court to charge that when the accretion from the Arkansas Island reached that point any accretion on the bed of the Old River east of that fixed line would be on land belonging to Tennessee under the water and could not become the land of Polsdorfer while wholly separated from it by the ungranted land belonging to the state lying in the bed of the river, neither could it afterwards when met by accretion from the Tennessee shore suddenly become all his to that line between the states.

If in the process of filling that channel, the accretion from the Arkansas shore reached and crossed that line while there remained a body of water over that portion of the bed of the river which belonged to Tennessee as ungranted land then that land at that time became by that cut off all at once the property either of Polsdorfer or else it remained the property of the state as ungranted just as it was ungranted state land before that cut off. It that be the law I ask the court to charge that Polsdorfer can not acquire title from the state by the sudden change of the river from one side of the island to the other—any more than Tennessee can acquire title to the island by the sudden change of the main channel from the one side to the other. The title to the bed of the stream having been before the change the property of the state as ungranted land remains after the sudden change the property of the state as ungranted land and does not become by the sudden change the property of Polsdorfer. In other words if the state could not acquire title to the island by the change, so Polsdorfer could not acquire the title to the bed of the channel by the sudden change.

I ask the court to charge that when the land in the old channel by the change became no longer navigable it became so with the title to it vested in the state as ungranted land. If the state was the owner of both sides of the pond or lake, the lake would be subject to the law of accretion and the owner of one side of the lake would have the same right to the accretions to his shore as the owner of the other side.

If the respective owners were states, the same rule

would apply and the accretion to Arkansas would be as much hers as those to Tennessee would be hers.

Additional Instructions for Ayres.

If the jury should find from the testimony that fractional sections 17, 18, 19 and 20 were in 1823 and on up to 1839-40, an island in the Mississippi river, whether on the east or west side of the Mississippi, at that time, and that about 1839 or 1840 or after that the waters running between the island and the Tennessee shore suddenly changed the course and so suddenly changed to the Arkansas side of the island as to make the bottom of the river between the island and the Tennessee shore dry land then this land would be what the law denominates reliction or relicted land; and would not belong to the shore owner on the Tennessee shore, but that part of it on the west side of middle stream of the Mississippi would belong to Arkansas and not to the owner of the island and that part of the reliction on the east side of the middle stream of the Mississippi would belong to the state of Tennessee and not to the Tennessee shore owner. In neither of these events could Mr. Polsdorfer recover in this suit, and the verdict should be for the defendants.

6. The court erred in excluding the record of the case of Toof, McGowan & Co. against E. M. Ayres and E. L. McGowan, trustee, No. 13210, Esquire Coleman's docket.

It was a record between the same parties or their privies in which the title and possession of the property here in controversy was necessarily in issue was tried and determined and never reviewed or reversed. That suit settled the ownership of any part of the land here in controversy against Williams, who was appellee's grantor of the 400 acres of land on the Tennessee shore.

7. The court erred in excluding the testimony of the witness, Lawrence, who testified or who would have testified, as follows:

"I was with appellant Ayres when he cut the tree spoken of in the record in the case of Hunter & Fry vs. Ayres, and we counted the rings on the part we sawed off the tree and there were some fifty-five, six or seven rings. I don't recollect the number exactly. And we had some discussion about the accuracy of the rings showing the number of years the tree was old. And I said to him: I recollect that thirty-five years ago there was a water tree cut on the mainland in just about such soil as this and I can find it. And if upon cutting into it the hole that we bored to get the water, has grown up with thirty-five rings over it, that will tell whether these rings are accurate

or not, in determining the age of the tree. We afterwards went and found the tree. I cut a block out of it where he had bored for the water, and I found exactly thirty-five rings on the block."

This evidence was offered to confute the testimony of the witness Stewart, who has testified to the unreliability of the concentric rings in a tree showing accurately the age of the tree. Which the court allowed the appellee to introduce. And also as showing the accuracy of these concentric rings as indicating the age of the tree. This evidence was of great importance because appellee's testimony as he insisted showed that the original Flour Island had been washed away entirely. One witness said about 1844, another 1850, and another in 1864. And appellant with other evidence, introduced evidence of a tree cut as he insisted on that original island in 1894. Which as he insisted by the rings in it showed its age to be 57 years. Which would have confuted the whole theory of appellee as to the island being washed away.

8. The court erred in excluding the testimony of the witness, John Lovewell, which was to this effect, that while he owned Flour Island he made a contract with Petty to cut timber on it. After the timber was cut and without his knowledge or consent the defendant, J. C. Marley, the grantor of appellee, for five thousand acres of land to which it is claimed the property here in controversy was accretion, got Petty to pay over to him, Marley, the value of the timber cut $80.00. That as soon as he heard of it he communicated with Marley, notifying him that he, Lovewell, was the owner of the island and he and Marley met at Ft. Pillow and after a conference Marley agreed that if he, Lovewell, would let him keep the $80.00 he, Marley, would from that time forth give up all claim to the island. That E. M. Ayres asked him about whether there was any claim on the island and he stated to him before he, Ayres, purchased the island, the property here in controversy, that the only controversy he ever had about the ownership of the island was this controversy with Marley and the settlement of the same as above stated. And that thereupon Ayres bought. The court also erred in excluding the testimony of Randol who fully confirmed Lovewell as to the settlement with Marley of their controversy about the ownership of the island. And Ayres fully confirmed what Lovewell stated to him about the matter. And that was one of the inducements for his purchase from Lovewell. All of which evidence was excluded by the court; and this was erroneous. Appellant insisted and now insists that this testimony was compe-

tent to prove an estoppel on Marley and on the appellee claiming under him to set up any claim to the same land.

C. W. Heiskell &
J. B. Heiskell,
Attys. for Appellant.

Circuit Court of the United States, Western District of Tennessee.

John H. Polsdorfer, et ux.,
vs.
Jo. C. Marley and others,
No. 3491.

Petition for writ of error. Filed Mch. 12, 1900.

And now again comes the defendant E. M. Ayres, by his attorney, and says that on January 6, A. D. 1900, this court entered in the above entitled suit a judgment in favor of the plaintiffs therein against this defendant, in which said judgment and proceedings in said suit certain errors were committed to the prejudice of this defendant, all of which will more fully appear by his bill of exceptions and assignment of errors on file in this suit. Wherefore this defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Sixth Circuit held at Cincinnati, Ohio, in said circuit for the correction of the errors so assigned.

E. M. Ayres.
By C. W. Heiskell,
His Attorney.

United States of America, Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D. 1899, at the United States Court House in the city of Memphis, in said District, on to-wit, the 12th day of March, A. D. 1900, in the following cause, to wit:

J. H. Polsdorfer, et ux., Plaintiff,
vs.
Jo. C. Marley and others, Defendant.
No. 3491.

This day comes the defendant, E. M. Ayres, by his attorney, and presents to the court and files in this suit his petition for the allowance of a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, held at Cincinnati, Ohio, in said circuit, he having filed in this suit his bill of exceptions and assignment of errors in such behalf; and for satisfactory reasons to the court appearing the prayer of the said petition is hereby granted and such writ of error awarded together with the usual citation in such cases upon the said defendant giving a supersedeas bond with good security according to law in the penal sum of two thousand dollars.

No. 3491. Circuit Court of the United States, Western District of Tennessee. J. H. Polsdorfer, et ux., vs. Jo. C. Marley, et al. Order of Court. Entered and filed 12 day of March, A. D. 1900. John B. Clough, Clerk.

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

E. M. Ayres, Plaintiff in Error,
vs.
J. H. Polsdorfer and wife, Defendants in Error.
} Supersedeas Bond. No. 3491.

Filed March 12, 1900.

Know all men by these presents, That we, E. M. Ayres, as principal, and John B. Driver and Will J. Driver, as sureties, are hereby held and firmly bound unto said John H. & Louisa M. Polsdorfer in the full and just sum of two thousand ($2000.00) dollars, lawful money of the United States, to be paid to the said John H. and Louisa M. Polsdorfer, for the payment of which well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this 12th day of March, A. D. 1900.

Whereas, the above named principal has prosecuted a writ of error to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, holden at Cincinnati, in the state of Ohio, to reverse the judgment rendered in the above entitled suit against said principal by the Cir-

cuit Court of the United States for the Western Division of the Western District of Tennessee.

Now, therefore, the condition of the foregoing obligation is such that if the above named principal shall prosecute his said writ of error to effect, and answer all costs and damages if he fail to make his plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

E. M. Ayres, (Seal.)
John B. Driver. (Seal.)
W. J. Driver. (Seal.)

Signed, sealed, delivered, taken and acknowledged before me at Osceola, Ark., this 12th day of March, A. D. 1900.

Chas. S. Driver,
Clerk of Circuit Court.

Approved at Memphis, Tennessee, on the day of date of the said bond.

E. S. Hammond,
United States District Judge.

United States Circuit Court of Appeals, for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.:

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John H. Polsdorfer and his wife, Louisa M. Polsdorfer, as plaintiffs, and E. M. Ayres and others are defendants, a manifest error hath happened, to the great damage of the said E. M. Ayres, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be herein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the eleventh day of April, next, in the said Cir-

cuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said Circuit Court the 13th day of March, A. D. 1900, and of the Independence of the United States of America the 124th year.

(Seal.) John B. Clough,
Clerk of the Circuit Court of the United States for the Western District of Tennessee.

Allowed by:
E. S. Hammond,
United States District Judge.

Acknowledgment of Service.

At Memphis, Tennessee, on this second day of April, A. D. 1900, we as attorneys for the within named John H. Polsdorfer and his wife, Louisa M. Polsdorfer, defendants in error, to the within writ of error, do hereby for them acknowledge due and legal service of said writ and admit that a copy of the same has been filed in said suit in the office of the clerk of the United States Circuit Court for the Western Division of the Western District of Tennessee at said Memphis.

Randolph & Randolph,
Attorneys for the said Polsdorfer and wife.

In the United States Circuit Court of Appeals, for the Sixth Judicial Circuit, Cincinnati, Ohio.

John H. Polsdorfer, et ux.,
vs.
Jo. C. Marley and others,

No. 3491.
Citation.

To John H. Polsdorfer and Louisa M. Polsdorfer, his wife, —Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the

Sixth Judicial Circuit, at a session of said court to be held in the city of Cincinnati, in the state of Ohio, in said circuit, on the 11th day of April, A. D. 1900, pursuant to a writ of error filed in the office of the Clerk of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, wherein E. M. Ayres is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of March, A. D. 1900, and of the Independence of the United States the 124th year.

(Seal.) E. S. Hammond,
U. S. District Judge for the Western District of Tennessee.

Acknowledgment of Service.

At Memphis, Tennessee, on this 2d day of April, A. D. 1900, we as attorneys for John H. Polsdorfer and his wife, Louisa M. Polsdorfer, defendants in error to the within citation do hereby for them acknowledge due and legal service of this writ.

Randolph & Randolph,
Attorneys for the said Polsdorfer and wife.

United States of America, Western Division of the Western District of Tennessee:

In the Circuit Court of the United States, within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November Term, A. D. 1899, at the United States Court House in the city of Memphis, in said district, on to wit, the 9th day of April, A. D. 1900, in the following cause, to wit:

John H. Polsdorfer, et al., Plaintiff,
vs.
Jo. C. Marley ,et al., Defendants.
} No. 3491.

Upon motion and application of E. M. Ayres, plaintiff in error, by his attorney, and for satisfactory reasons to

the court appearing and for good cause shown the time of his docketing this suit in and filing the record thereof with the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, holden at Cincinnati, Ohio, is hereby enlarged and extended to May 15, A. D. 1900.

No. 3491. Circuit Court of the United States, Western District of Tennessee. J. H. Polsdorfer, et ux., vs. Jo. C. Marley, et al. Order of Court. Entered and filed 9 day of April, A. D. 1900. John B. Clough, Clerk.

The United States of America, Sixth Judicial Circuit, Western District of Tennessee.

I, John B. Clough, clerk of the Circuit Court of the United States, for the Western Division of said Western District of Tennessee, do hereby certify that the papers hereto attached, are full, true, perfect and correct copies of the originals and of the entire record and proceedings (including the original writ of error and original citation) in said court as the same now appears of record and upon the files in my office, in the following cause, to wit:

E. M. Ayres, Plaintiff in error,

vs.

John H. Polsdorfer, Louisa M. Polsdorfer, Defendants in error.

} No. 3491.

In testimony whereof, I have hereunto written my name and affixed the seal of said court, at my office in the city of Memphis, Tennessee, this 19th day of April, A. D. 1900, and of the Independence of the United States the 124 year.

(Seal.) John B. Clough, Clerk.

Authentication.

I, E. S. Hammond, a judge of said court, do hereby certify that John B. Clough, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, clerk of said court, and that his attestation is in due form.

E. S. Hammond,
Judge of the District Court of the United States for the District aforesaid.

No. 3491. Circuit Court of the United States, Western District of Tennessee. E. M. Ayres, plaintiff in error, vs. John H. Polsdorfer, Louisa M. Polsdorfer, Defendants in error.

And afterwards to wit on May 7th 1900 præcipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1899.

E. M. AYRES
vs.
LOUISA M. POLSDORFER. } No. 848.

To the clerk of said court:

Please enter my appearance as counsel for the plaintiff in error.
C. W. HEISKELL.

And afterwards to wit on August 29th 1900 a motion to dismiss was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

E. M. AYRES
vs.
JNO. H. POLSDORFER & LOUISA M. Polsdorfer, His Wife. } = 848. Motion to Dismiss.

And now come the defendants in error and move the court to dismiss the writ of error herein, for the following reasons: Because the defendant, Thomas Price against whom there is a joint judgment with plaintiff in error, E. M. Ayres, has not joined in said writ of error and no reason is shown in the record for his not doing so, nor does the record show that any request was made of him to join, or refusal on his part to do so.

RANDOLPH & RANDOLPH,
Att'ys for John H. Polsdorfer & Wife.

United States Circuit Court of Appeals for the Sixth Circuit.

E. M. AYRES
vs.
JNO. H. POLSDORFER & Wife, LOUISA M. POLSDORFER. } = 848.

To C. W. & J. B. Heiskell, counsel for appellant:

Please take notice that on Tuesday, the 2nd day of October, 1900, at the opening of the court, or as soon thereafter as counsel can be heard the motion of which the foregoing is a copy will be submitted to the United States circuit court of appeals for the sixth circuit for the decision of the said court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the motion and support thereof.

RANDOLPH & RANDOLPH,
Att'ys for Polsdorfer and Wife.

Service of the aforegoing notice with the copy of motion therein referred to, and the brief of counsel in support of the same attached is hereby acknowledged, upon receipt of a copy of the same, this 23rd day of August, 1900.

C. W. HEISKELL.

And afterwards to wit on October 2nd, 1900, an order to print the motion to dismiss was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

E. M. AYRES
vs.
JOHN H. POLSDORFER ET UX.

It is ordered in this cause that the motion to dismiss the writ of error shall be printed.

And afterwards to wit on November 16th, 1900, an entry was made upon the journal of said court which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

E. M. AYRES
vs.
JOHN H. POLSDORFER ET UX.
} Error to the Circuit Court of the United States for the Western District of Tennessee. Before Judges Lurton, Severens, and Evans.

This cause coming on for hearing is argued on behalf of plaintiff in error by Mr. C. W. Heiskell and no one appearing for defendant in error, the cause is submitted.

And afterwards to wit on December 4th, 1900, an order dismissing writ of error was entered which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit *Court.*

E. M. AYRES
vs.
JOHN H. POLSDORFER ET UX.
} Error to the Circuit Court of the United States for the Western District of Tennessee.

This cause having been called for hearing in its regular order and a motion by counsel for defendant in error to dismiss this cause having been filed and argued by counsel, therefore in pursuance of said motion, it is now here ordered and adjudged by this court that the writ of error be and the same is hereby dismissed with costs.

And afterwards to wit on January 2nd 1901 an opinion was filed in said cause which reads and is as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

E. M. Ayres, Plaintiff in Error, v. John Polsdorfer and Wife, Louisa Polsdorfer, Defendants in Error.	No. 848. Error to the Circuit Court of the United States for the Western District of Tennessee.

Submitted November 16, 1900; decided December 4, 1900.

Before Lurton and Severens, circuit judges, and Evans, district judge.

Severens, circuit judge, delivered the opinion of the court:

This is an action of ejectment, brought by Polsdorfer and wife, the defendants in error, against Ayres, the plaintiff in error, Thomas Price and others, to recover several thousand acres of land fronting other lands owned by the plaintiffs in the suit, on the eastern shore of the Mississippi river, in Lauderdale county, Tennessee. Their right to recover the lands in question, which had been formed in the bed of the river by changes in the current, and the deposit of alluvion, was rested upon the claim that they were accretions to the land which they owned along the shore. The parties defendant were made such under the provisions of the statute of Tennessee, Shannon's Code 4972 (3231), which provides that if there be no actual occupant of the lands, the action is to be brought "against any person claiming an interest therein, or exercising acts of ownership at the commencement of the suit."

The declaration alleged that the plaintiffs were at a date named "lawfully entitled in fee and were in possession" of the lands described, and then averred that "the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to wit, on the said first day of October, 1898, in the said county of Lauderdale, unlawfully and without right entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do."

Ayres filed the general plea of "not guilty," and a special plea of the statute of limitations of Tennessee. Price pleaded not guilty. For the purposes of the decision of this court, it is unnecessary to detail the proceedings in the suit, which relate to or were taken by the other defendants.

The case came on for trial before a jury. The plaintiffs gave evidence of their ownership of the land on the Tennessee shore and of facts on which the accretion of the land in question was

claimed to have enured to them by virtue of such ownership. The defendant, Ayres, now plaintiff in error, gave evidence, to support his claim to the land, of a grant from the State of Arkansas to a person from whom he deraigned title, of lands constituting an island, or islands, in the river, lying west of the middle of the channel, which constituted the boundary of the States, and of facts tending to support his contention that the lands in suit were accretions to that ownership. Price defended his claim to the lands under a grant of the lands by the State of Tennessee of recent date, contending that the plaintiff's ownership extended only to the shore and that the made land was between that to which the plaintiff had title and the middle thread of the river, and rested upon that which had never passed from the State until its grant to that defendant.

At the close of the evidence, the jury, under direction of the court, rendered a verdict for the plaintiffs against both Ayres and Price, for all the land claimed by each of them, except a portion claimed by Price only. The defendants excepted to this direction of the verdict. Judgment was entered thereon as follows: "It is, therefore, considered, ordered and adjudged, that the plaintiffs do have and recover of and from the defendants, severally, the lands hereinbefore described, found by the verdict of the jury to belong to them in fee, and that the plaintiffs do have and retain the possession of such lands under and in accordance with their said title; and that as to the lands herein sued for, not embraced by the verdict of the jury in favor of the plaintiffs, the defendants go hence without day; and that the plaintiffs recover of the defendants all their costs herein expended, and that execution issue therefor."

Ayres tendered a bill of exceptions, which was settled and filed, and without taking notice of Price, who appears to have been the only other contestant for the lands recovered, sued out this writ of error.

Upon the hearing, counsel for defendants in error, raised the objection that Ayres alone prosecuted the writ without having obtained any order permitting him, Ayres, to proceed alone, or taking any equivalent steps in that regard to justify himself in suing out the writ without the joinder of Price, and this presents a question which we must first consider.

The rule is firmly established, at least, in the appellate courts of the United States, that where a judgment or decree is rendered against two or more jointly, all must join in suing out the writ of error or prosecuting an appeal, unless those who are not joined have been invited to come in and have refused; and proof that this has been done must be made to appear by the record of the circuit court, before a writ of error or an appeal by less than the whole can be allowed. The reasons for this, as has often been stated, are that the prevailing party to the judgment should have the right to execute it against those who do not appeal, and that neither the appellate court nor the party obtaining the judgment ought to be burdened with successive appeals upon the same matter. And while consid-

erable liberality has been shown in regard to the method by which the severance is effected, the rule itself has been constantly applied. The cases are too numerous, and the law and practice too well settled, to require comprehensive citation. We cite a few of the more recent. Masterson *v.* Herndon, 10 Wall. 416; Simonson *v.* Greeley, 20 Wall. 152; Estis *v.* Trabue, 128 U. S. 225; Hardee *v.* Wilson, 146 U. S. 179; Davis *v.* Mercantile Trust Co., 152 U. S. 590; Beardsley *v.* Arkansas & L. R'y Co., 158 U. S. 123; and see Mercantile Trust Co. *v.* Kanawha & O. R'y Co., 7 C. C. A. 3, a case decided by this court.

In its enforcement a dubious question has frequently arisen as to whether the judgment or decree was in legal contemplation a joint or several one; and in solving it the courts have looked to its substance rather than its form. See the above-cited cases and those which follow.

In many cases the rule has been held not applicable, where the party claiming to be aggrieved, although he is one of several parties against whom the judgment was rendered, yet alone represents some distinct and substantive subject-matter in which the others have no concern, or are only incidentally concerned by reason of the allowance or rejection of the matter in question. Cox *v.* United States, 6 Pet. 172; Todd *v.* Daniel, 16 Pet. 521; Germain *v.* Mason, 12 Wall. 259; Henrick *v.* Patrick, 119 U. S. 156; Gilfillan *v.* McKee, 159 U. S. 303; Union Steamboat Co. *v.* The Erie & Western Transportation Co., decided by this court October term, 1900.

It is earnestly insisted by counsel for the plaintiff in error that this case falls within the class of cases last mentioned because it appears that Ayres and Price founded their claim to the land upon wholly distinct and antagonistic titles. But it was the land itself which was the subject of the suit, and the titles which each of these defendants advanced, amounted to no more than separate means to a joint defense. Each of these means was also available to both defendants.

The rule is that separate pleas and separate defenses, founded upon distinct sources of right, do not make the judgment several, when they are brought forward in defense of a single cause of action, upon which the judgment is recovered. The *res* is not thereby divided. In many of the cases already cited there was no unity of title between the parties bound by the judgment, from which the appeal was taken, cases wherein the appeal was held ineffectual, because parties not joined had an interest in the question whether the judgment should stand or be reversed.

Counsel for plaintiff in error further urges that before the objection was brought forward the time for taking a writ of error by Price had expired, and that, therefore, he is as effectually precluded as if he had originally been summoned and had refused to join, and further that no right of the plaintiff has been delayed by his nonjoinder. This answer is plausible, but it does not reach the root of the matter, which is treated as one of jurisdiction. This must be tested by the conditions existing at the time when the writ was sued out. The action had not then been severed, and for aught that then

appeared, Price might also take out a writ. And it is clear that if the present writ was ineffectual to remove the case, it could not be made valid by mere lapse of time and the coming on of subsequent conditions. Mason *v.* United States, 156 U. S. 581; Wilson *v.* Life and Fire Ins. Co., 12 Pet. 140; Estis *v.* Trabac, 128 U. S. 225; Inglehart *v.* Stansbury, 151 U. S. 68.

The bill of exceptions was tendered by Ayres alone. The pleadings are in the statutory form and the judgment simply responds to them. So far as we can see, no question could arise upon the record proper; and as Price did not procure the settlement of a bill of exceptions in his behalf there is perhaps some ground for saying that he was already disabled from prosecuting a writ of error, and that, therefore, a summons and severance would have been a futile performance. But at the time when this writ of error was taken, Price, if he could not avail himself of the bill of exceptions which Ayres had procured to be settled, was not, so far as we know, debarred from procuring the settling of a bill in his own behalf and joining in the writ of error.

Stress is also laid upon the fact that by the language of the judgment it is adjudged in terms "that the plaintiffs do have and recover of and from the defendants severally," etc. But we think it manifest that, in substance and effect, the judgment operated against them jointly, conforming to the verdict. In Hampton *v.* Rouse, 13 Wall. 187, the verdict was jointly against two defendants, but the judgment was in form against the one who brought the case up. The reporter states that the court held this a mere clerical error. The writ of error was dismissed for the non-joinder of the other defendant.

It is a matter for regret that this defect was not brought to the attention of the court before the expiration of the time allowed by law for suing out the writ after the entry of the judgment. In these circumstances, seeing that the right to a new writ is now barred, we should have been willing, if possible, to find some ground on which to support the jurisdiction. But the objection is one which may be raised at any time before judgment is entered, and, indeed, is one of which the court is required to take notice *sua sponte*.

The writ of error must be dismissed.

And afterwards to wit on January 14th a petition for a rehearing of said cause was filed clothed in the words and figures as follows:

Petition for Rehearing.

In the United States Circuit Court of Appeals for the Sixth Circuit.

E. M. AYRES, Plaintiff in Error,
vs.
JOHN H. POLSDORFER and WIFE, Def'ts in Error. } No. 848.

To the hons the judges of the United States circuit court of appeals, sixth circuit:

The above-named E. M. Ayres most respectfully petitions the honorable court to rehear this cause, for the reason that in the dismissal of the writ of error for non-joinder of Price, the codefendant below, the court erred. And he respectfully shows the following reasons why the same should be reheard.

The fact that the argument was made by petitioner's counsel alone, without any contestation to draw out the points on the other side—together with the fact that the court by their questions as to the several character of the interests of the defendants below, led counsel to believe that the court was fully satisfied on that point, and consequently led him to devote his whole attention to the merits of the case, perhaps leading the court to suspect him of purposely slurring over, or evading this branch of the case.

Counsel have since the announcement of the decision made a most thorough and exhaustive research into the cases and authorities on the subject involved in said decision, and are now able to present considerations not known to them, and not foreshadowed in the argument presented on the hearing; and considerations of which scarce an intimation or suggestion is to be gleaned from the decisions relied on either in the printed arguments on both sides, or the oral argument on behalf of petitioner.

These consist in brief—

1. In the fact that in the discussion of the matter, the distinction between matter of tort and matter of contract—between actions *ex delicto* and *ex contractu*—was in no manner considered or suggested; whereas counsel are now prepared to show that this distinction lays at the root of the question and is controlling.

2. That the question whether the joinder of parties in error is jurisdictional, was not examined on principle or discussed; when it can be shown that the holding of the cases deciding it to be so, cannot be reconciled to well-settled principles of law, or to the action of the court in other and numerous cases, well-considered and correct in principle. That the ground on which English courts hold jurisdiction to attach in error, has no application in the United States, and that their principles differ *toto cælo*.

3. That the right to amend in the matter of parties was not presented, and that it can now be shown that on principle this right, which is denied in several cases, unquestionably ought to be maintained.

4. That no discussion was had or reasons given why the non-joinder of plaintiffs in error in cases like that before the court, is matter of form and not of substance; whereas now counsel are prepared to show upon principle and authority, that the only reasons for the rule mark it as distinctively matter of form.

5. That counsel are now prepared to show that if they had joined Ayres and Price in this writ of error, it would have been a fatal misjoinder, which could not upon authority be corrected by severance—which remedy would have been denied on the ground that it was their folly to have joined.

6. That neither in oral or written argument heretofore presented was there a review of the cases decided by the United States courts or any attempt to deduce any underlying principle, harmonizing the cases, or attempting any exhaustive examination of them; whereas now counsel believe they have examined and critically considered every case on the subject decided in the Supreme Court of the United States and in the United States courts of appeal, with other cases in State courts and at common law—and they confidently submit that the court, upon the review herewith presented, will feel constrained to grant the rehearing and reverse the case on the merits.

7. That the cases in the United States courts in which parties have been held to be indispensable (so far as appears from the reports) are cases growing out of contracts or relations arising out of contracts, except in two cases *ex delicto* or in the nature of ejectment. In one of these, Hanrick *v.* Patrick, the rule was held not to apply; in the other, Hampton *v.* Rouse, the interests seem to have been joint as well as the judgments.

8. That upon the ground that the writ of error is a commission whence the jurisdiction of the court is derived, it would necessarily result that the power which could confer the jurisdiction could and must define the case and the parties as to whom the jurisdiction should operate, and that the inferior agent could neither extend nor narrow the limit as to case, person or property, but must necessarily pursue the power conferred without question.

9. That among the matters of record showing the interests of Ayres and Price, counsel did not show heretofore the fact that the declaration, as quoted in the opinion of the court, expressly charges the wrongful act of the said Ayres and Price to have been that they "set up title thereto as in them respectively," and that they entered and cut timber, &c., "under such unjust claim of title," thus charging the wrong for which they were to be sued, to be several, and nowhere intimating that it was in any manner joint or confederate, or in any sense common. See opinion p. 2, Rec. p. 4.

10. This case falls distinctly within the exception to the rule. It is clearly a case of not only a separable but separated interest; not only separate but adverse.

11. That the cases in which exceptions have been made and parties held to be not indispensable, are much stronger cases for requiring joinder than the case before the court—going to the extent

of holding that one appeal was good though it had to await action upon the determination of another appeal from the same decree.

12. That the ground taken by the court in the opinion that the identity of the *res* is sufficient to require the joinder, is inconsistent with many cases in which the motion to dismiss is denied both in the Supreme Court and the court of appeals.

Petitioner therefore prays the court to rehear the cause upon this question; and considering the importance of the question and the broad range of the argument necessary to cover the principles and learning involved, he prays that counsel or one of them be heard orally, and the order of dismissal be set aside and the cause reversed on its merits.

J. B. & C. W. HEISKELL,
Counsel for Ayres.

I hereby certify, that I have read the opinion of the court in this case, and the petition for re-argument by plaintiff in error, and the brief in support of the same, and that I have also read some of the authorities referred to in said brief: and in my opinion, the decision and opinion of the court are erroneous, and a re-argument ought to be granted.

Respectfully, etc., TIM. E. COOPER.

I hereby certify, that I have carefully read the opinion of the court in this cause, the petition to rehear the same, and the argument of counsel in support of said petition, and I concur in the opinion of Judge Cooper above.

T. B. TURLEY.

And afterwards to wit on February 23rd 1901, an order denying said petition for rehearing was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

E. M. AYRES
vs.
JOHN H. POLSDORFER ET UX.

The petition for rehearing in this cause is denied.

To the Hon. John M. Harlan, associate justice of the Supreme Court of the United States:

The petition of E. M. Ayres, a citizen of the State of Arkansas respectfully represents, that he was sued on the 15th day of October, 1898 in the circuit court of the United States, at Memphis, Tennessee, by J. H. Polsdorfer and wife, citizens of Indiana. And with petitioner was sued one Thomas Price, a citizen of Tennessee with other parties not material to mention.

Petitioner and said Price were sued in ejectment for separate and distinct entries and claims of title. Petitioner's deraignment of title was from the United States and the Territory and State of Arkansas,

for all of the land in controversy, some 5,000 acres, worth over $10,000.00. And the said Thomas Price claimed some 2,000 acres of the land in controversy under a grant from the State of Tennessee. The declaration alleged that they were laying claim under their respective titles. Petitioner claimed that the land in controversy was Flour island and accretions thereto which had been surveyed in 1823 and laid down on the map of the United States Land Office as a part of the territory of the United States, and afterwards as part of the territory and then of the State of Arkansas.

Price claimed that Flour island washed away and that another island formed on the Tennessee side of the middle of the Mississippi river, and that he got the land (his 2,000 acres) under his grant from the State of Tennessee.

Polsdorfer claimed that he bought a 5,000 and a 400 acre tract bordering on the Mississippi river in Tennessee, and that the land in controversy was accretion to these tracts of land. In other words, he claims title from the State of Tennessee.

Upon peremptory instructions, by the trial judge, the jury found for the plaintiff. And the court rendered judgment against the defendants severally—the judgment being against petitioner for all of the land in controversy and against Price for part of the land he claimed, and in his favor for part.

From this judgment petitioner prosecuted a writ of error to the circuit court of appeals sixth circuit.

Appellee made a motion to dismiss the writ of error upon the ground of the non-joinder of Price in the appeal—without summons and severance, which motion was granted.

Upon a motion to rehear on this point, the said court dismissed the petition.

And petitioner prays for a writ of error, to the end that the errors intervening in the decision of the said United States circuit court of appeals, sixth circuit may be corrected.

Writ allowed, upon bond of $500 for costs.

JOHN M. HARLAN,
Asso. Justice S. C. U. S., 6th Circuit.

And petitioner assigns errors as follows:

1.

The court erred in dismissing the writ of error of petitioner upon the ground that the judgment was against two jointly, and that they did not join in the appeal.

In support of assignment he submits counsel's brief No. 1.

2.

The court erred in dismissing the petition for rehearing made by this petitioner.

In support of this assignment he submits herewith counsel's brief No. 2.

3.

The court erred in refusing to entertain jurisdiction of this cause and not reversing it upon the merits. And in support of this he refers to the assignment of error Record pp. 266, 273 and submits herewith his counsel's brief thereon No. 3.

The ground of this application is that the record in this cause shows that petitioner claimed under muniments of title from the State of Arkansas and Polsdorfer and wife and also Price claimed under muniments of title from the State of Tennessee. In other words petitioner claims that he has a right to the writ of error under the Constitution of the United States, article 2, section 2. And in support of this his counsel submits the following brief.

THOS. B. TURLEY.
J. B. HEISKELL.
C. W. HEISKELL.

In the Supreme Court of the United States.

E. M. AYRES
vs.
J. H. POLSDORFER ET UX. } No. —. Cost Bond.

Know all men by these presents, that we, E. M. Ayres as principal, and C. W. Heiskell, J. B. Heiskell and T. B. Turley as sureties, are hereby firmly bound unto said J. H. Polsdorfer & Louisa Polsdorfer in the full and just sum of five hundred ($500.00) dollars, lawful money of the United States, to be paid to the said J. H. and Louisa Polsdorfer, for the payment of which well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this 12th day of April, A. D. 1901.

Whereas the above-named principal has prosecuted a writ of error to the Supreme Court of the United States, holden at Washington, District of Columbia, to reverse the judgment rendered in the above-entitled suit against said principal by the United States circuit court of appeals, sixth circuit, sitting at Cincinnati, Ohio.

Now, therefore, the condition of the foregoing obligation is such that if the above-named principal shall prosecute his said writ of error to effect, and answer all costs and damages if he fail to make his plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

E. M. AYRES,
By C. W. HEISKELL, *Att'y.* [SEAL.]
C. W. HEISKELL. [SEAL.]
J. B. HEISKELL. [SEAL.]
THOS. W. TURLEY.

Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 12th day of April A. D. 1901, and I hereby

certify that the above bond is ample for the amount of the penalty therein.

JOHN B. CLOUGH,
Clerk and Commissioner.

Approved:
JOHN M. HARLAN,
Associate Justice of the Supreme Court U. S.

April 15, 1901.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of E. M. Ayres *vs.* John H. Polsdorfer & wife, No. 848, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 22nd day of April A. D. 1901.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between E. M. Ayres, plaintiff in error, and John H. Polsdorfer and his wife, Louisa M. Polsdorfer, defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of April, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA, } *ss:*
Sixth Judicial Circuit. }

Pursuant to the direction of the foregoing writ, I herewith return the same together with a certified copy of the record in said case in this court, together with assignments of error, copy of bond and citation.

In testimony whereof, I have hereunto set my hand and the seal of this court, at Cincinnati, Ohio, this 22nd day of April, A. D. 1901

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *ss:*

To John H. Polsdorfer and his wife, Louisa M. Polsdorfer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein E. M. Ayres is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand nine hundred and one.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

For defendants in error we acknowledge receipt of a copy of the within citation.

April 18th, 1901.

RANDOLPH & RANDOLPH, *Att'ys.*

Endorsed on cover: File No. 18139. U. S. C. C. of appeals, 6th circuit. Term No. 310 E. M. Ayres, plaintiff in error, *vs.* John H. Polsdorfer and wife Louisa M. Polsdorfer. Filed April 29, 1901.

No. 310. 89.
(Brf. of Turley & Heiskell for Pl'ff in Error)

Office Supreme Court
FILED
MAR 21 1902
JAMES H. McKENNEY,
Clerk.

Filed Mar. 21, 1902.

No. 310. 89.

Supreme Court of the United States

E. M. AYRES,
Plaintiff in Error,

VS.

JOHN POLSDORFER and WIFE,
Defendants in Error.

Brief for Plaintiff in Error.

Hon. T. B. TURLEY,
J. B. and C. W. HEISKELL,
Solicitors.

S. C. TOOF & CO., PRS. & LITHS. MEMPHIS

Supreme Court of the United States.

OCTOBER TERM, 1901.

E. M. AYRES, Plaintiff in Error,

vs.

JOHN H. POLSDORFER AND WIFE, Defts. in Error.

ASSIGNMENTS OF ERROR.

1.

The Court of Appeals erred in dismissing the writ of error in this case upon the ground that the judgment in the court below was against two jointly, and that they did not join as plaintiffs in error.

2.

The court erred in dismissing the petition for rehearing.

3.

The court erred in refusing to entertain jurisdiction of this cause, and in failing to reverse upon the merits.

4.

The court erred in refusing to reverse for the errors specifically assigned on behalf of plaintiff in error E. M. Ayres in the Circuit Court of Appeals as shown in this transcript at pages 266, 267, 268, 269, 270, 271 and 272. The errors particularly relied upon here are assigned in our brief on the merits, post page

ARGUMENT.

Polsdorfer sues in ejectment, Ayres and Price, who have no connection with each other, one claiming under a grant from Tennessee, the other under a grant from the United States, as lands in Arkansas.

The declaration, Rec. p. 4, runs: "And the plaintiff being so entitled to the said property and so in possession thereof the said defendants unlawfully and without right entered into and upon the said premises and falsely and unjustly set up title thereto as in them respectively," * without charging that the trespass was joint or by collective action or combination or confederation. And as they claimed *respectively*, there is not any ground for presumption that under their *respective* and not joint title, they combined to act conjointly. On the contrary, claiming under *respective*, that is several titles, the presumption is that they would not harmoniously combine. As they claimed *respectively*, the presumption would be that their title could not harmonize and their action would be separate. The record shows this to be true.

E. M. Ayres and Thomas Price's claims to the land in controversy are as antagonistic as the claims of plaintiff in error Ayres and Polsdorfer and wife, defendants in error. Ayres and Price appear by different attorneys, plead separate and different pleas, claim under adverse titles, introduce different witnesses,

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*Respective. Relating to or pertaining severally, each to each; several; particular.

"To those places straight repair,
Where your respective dwellings are."—*Butler.*

"They both went very quietly out of court and retired to their respective lodgings."—*Addison.*

"Beyond the physical differences, there are produced by the respective habits of life, mental differences.—*H. Spencer.*

See Century Dictionary.

seek to prove contradictory states of fact, ask inconsistent instructions, and the judgment is rendered against them *severally* (*sic.*) Rec. p. 11. Ayres takes a bill of exceptions. Price does not. Ayres claims title and defends upon the ground that the lands in controversy are a part of Mississippi county, Ark. Whereas Polsdorfer's claim and his only claim is, that the land in controversy is accretion to his land in Lauderdale county, Tenn., held under grants from the State of Tennessee. And Price defends upon the ground, and only upon the ground, that a part of the land in controversy is not accretion to Polsdorfer's land, but that it was land belonging to the State of Tennessee, and that on the 20th day of October, 1891, he obtained a grant from the State of Tennessee for 2150 acres (Record p. 114), of the 3000 to 5000 acres here in controversy.

Ayres claims all of the land here in controversy as Arkansas land (an island with its accretions) and under his plea of not guilty that it could not be adjudicated by a Tennessee court to belong to a Tennessee claimant under a Tennessee grant, and that he is the owner thereof by reason of his muniments of title from the State of Arkansas; and further, that in no event was it accretion to Polsdorfer's land. R. 210, 230–232, 242, 145–149, 191, 195, 181, 200–210.

Price under his plea of not guilty claims that the land was not accretion to Polsdorfer's land, but that it was an island in the Mississippi River belonging to the State of Tennessee and enterable under the law of the State of Tennessee, and that he obtained a grant from that State for a part of it. R. 114.

Polsdorfer's sole claim is that the land in controversy was *accretion to land that he had bought in Lauderdale county, Tennessee, lying on the banks of the Mississippi River.*

Price took no bill of exceptions. Ayres took writ of error without Price. Writ dismissed for non-joinder.

In this case we want to show that by the most technical

rule, by every consideration of reason and justice, by an overwhelming mass of authority, that this decision is wrong, and that if we had joined two persons who had no joint interest, by a strict application of the most technical rule of the common law, we would have been subjected to the very dismissal, which we have incurred by the application of those technical rules as construed in this case.

The first case that is cited in this argument is three hundred years old, and is exactly in point in the present case. It has never been overruled, questioned, criticised or disapproved, and we have found no case inconsistent with it; but it falls short in one of its details of the present case. In that case the only *vinculum* of the joint plaintiffs in error was the common judgment of outlawry against four defendants. Of course no one man could have any legal interest in the outlawry of another. So they had no joint or common interest in reversing the judgment; this far they are in the predicament of Ayres and Price. On the other hand, they had no adverse interest, and could join in the assignment of error; whereas, Ayres and Price have adverse interests which preclude their joining in the same assignments. In this respect the case at bar is much stronger against joinder than the one in 6 Rep. 25.

This authority establishes the point, that if one who has joined in the writ of error refuses to join in the assignment of errors, then there must be a summons and severance.

It also holds that if two join who need not, and one defaults, then the case must go out of court and there can be no severance, for it was the plaintiff's own folly to join the others. Where four had joined in a writ of error to reverse a judgment of outlawry (observe *a* judgment—*one* judgment) and two of them had made default, judgment of severance could not be given, because as they might have had several writs of error, it was their folly to join in one writ.

Paddock's case, 6 Rep. 25; Bac. Abr. vol. 9, p. 272.

Here is a case reported by Coke, decided by Popham,* when courts were perfectly familiar with the formalities of the common law, and especially when this severance was in flower, and it is exactly in point—that Ayres and Price might have joined in error, but if one of them had refused to join in the assignment of error the case would have been subject to be dismissed, because it would have been their folly to have joined, as they might have had several writs of error.

Ayres and Price are so far separated that they could not join in an action of trespass against Polsdorfer. Two persons having no community of interest cannot join in a suit.

Now, upon what principle would they be permitted to join in error unless the defendant in error is estopped by his joinder of them below?

But his estoppel would only permit them to join—it could not be obligatory upon them.

As to joinder of parties, writs of error stand on the footing of original suits. See Brewster v. Wakefield, 6 How. 201.

In an original action either the general or special owner may bring trespass or trover; but a recovery by one is a bar to the other.

If the general owner has not the right of immediate possession, he cannot maintain trespass or trover, though he may have case for injury to his reversionary interest.

Tenants in common *cannot* join in ejectment, but *must* sever in separate demises in ejectment. Nor should tenants in common join in debt for double rent.

1 Ch. Pl. 62.

"In ejectment the demise declared upon by the plaintiff in the modern practice is fictitious only; but still it must be consistent with the title of his lessor; that is to say, such a demise must be supposed to be made, as would, if actually made, have

*NOTE.—"This we know; that he became a consummate lawyer."—Campbell's Lives C. Js., 188.

transferred the rights of possession to the lessee. Thus, if there be several lessors, and a joint demise by them all be alleged, such a title must be shown at the trial as would enable each of them to demise the whole; because if any one of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them. As, where A was tenant for life, and B had the remainder in fee, and they made a lease to C, and declared upon the lease as a joint demise, it was held bad; because, during A's life, it was the lease of A and the confirmation of B; and after the death of A, it was the lease of B and the confirmation of A, but not a joint demise.

"Joint tenants or parceners have a sufficient interest in the lands held in joint tenancy, or parcenery, to entitle them to make a joint demise of the whole premises, but tenants in common have not; and the reason for this difference seems to be that tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also, whilst joint tenants and parceners are seized *per my et per tout*, derive by one and the same title, have a joint possession, and must join in any action for an injury thereto; so that each of them may be properly said to demise the whole. It is not, however, compulsory upon joint tenants, or parceners, to allege a joint demise; for if a joint tenant or parcener bring an ejectment without joining his companion in the demise it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land."

Tillinghast's Adams 209, side p.

Tenant and landlord need not, probably cannot, join for injury affecting both. 1 Ch. Pl. 63.

One may sue alone for injury to the common, though his proportion of the damage is only a farthing. Ib. 64.

To allow persons to join they must have a joint interest. If the interest is several, they may join or sever if the damage

be joint; but where the damage as well as the interest is several, they must must sue separately. Ib.

Two persons may (not must) jointly sue for malicious arrest, if it be laid as special cause that they jointly incurred an expense in procuring their liberation; but if the recovery is for not only the joint expenses but for other damages, the judgment is bad. Ib.

In damages to personal property, persons having separate interests cannot join. Ib. 65.

Now, the writ of error is a new suit (Tidd's Pr. 1132–1141) and the assignment of errors is the declaration (Tidd's Pr. 1168), and parties who cannot join in a declaration to recover for an injury common to each, but not joint, cannot jointly assign errors, any more than they could jointly declare upon adverse claims in an original suit.

In Masterson v. Howard, 10 Wall. 416, Miller, J., cites 2 Tidd's Pr., and puts the refusal of a party to join in the assignment of error on the footing of refusal to join in the writ.

Let us imagine Ayres and Price joined in error and assembled to join in assignments of error.

Having no community of interest, Ayres could not assign an error against Price as an injury to him, nor could Price assign as against his right any error as to Ayres.

If the error was one charge equally applicable to both, as it affected Ayres it would be no ground of complaint, or exception by Price—it would not be a joint injury, but several to each. Just as if one man by one stroke of his stick should have knocked both of them down, they could not join in one action for damages; for Price could not say the blow to Ayres was to his (Price's) damage, nor could Ayres say that the man hit Price to his (Ayres') damage.

Price says, "The court charged the jury that my title from the State of Tennessee is void, because the Legislature has not provided for any entry and grant on newly formed land."

"The court was right," says Ayres. "I am not going to assign that for error. But you assign this."

"The court held that my purchase under the Arkansas tax sale conveyed no title." What would Price reply? "If you won't assign for error that he charged that I had no title. I won't assign it as error that he charged you had no title."

"Well, he held that if the island was washed away entirely and a new island formed, this island was Tennessee land and could not belong to me."

"Why, Ayres, that is no error. My title depends on the truth of that very proposition."

"Well, I'll ask the court to sever us; we can't join."

Per curiam: "You must go out for your folly in joining in a suit in which you have no community of interest and can't have a common judgment—but must have a dismissal because you have no joint, but wholly adverse, interests. You might have had separate writs of error."

Ayres and Price are so far separated that they could not join in an action of trespass against Polsdorfer. Two persons having no community of interests cannot join in a suit.

Now, upon what principle would they be permitted to join in error unless the defendant in error is estopped by his joinder of them below?

But his estoppel would only permit them to join—it could not be obligatory upon them; and if they joined and then one backed out, it would be a fatal error.

Tidd cites 2 Str. 783, a case where one executor refusing to join, the court of errors gave time until there could be summons and severance. But what need to sever a party whose right is already extinguished by the bar of the statute?

"If several join in an assignment of errors and one plaintiff does not appear, or after appearance refuses to join, there may be judgment that he be severed and the other shall sue alone.

"And if there be default before appearance, a summons shall be awarded against the demandant or plaintiff who does not appear; and at the return of the summons there shall be judgment that the other *sequitur solus*. See Co. Lit. 139 b.

"After appearance there shall be judgment without summons, *ad sequendum simul*. Co. Lit. 139 b."

Here the summons and severance is in the court of error.

It may be readily conceived that in cases *ex contractu* two parties may have interests in a recovery that are joint and inseparable. They must be joined in any suit to pursue their remedy. But if one refuses to join, the court will not compel him to join, but by summons will bring him into court, and if he refuses, will order a severance and let the one proceed. Thus the remedy is exactly the same in an original action as in a writ of error—the same objection, the same remedy.

Let us now consider the direct authorities on this point.

REVIEW OF THE CASES

In which the motion to dismiss has been denied.

"It is a general rule that no person can bring a writ of error to reverse a judgment, who was not a party or privy to the record or prejudiced by the judgment, and therefore to receive advantage by the reversal of it. Hence it has been determined that if there be judgment against the principal and also against the bail, the principal cannot have error on the judgment against the bail, nor the bail on the judgment against the principal. Nor can they join in a writ of error, for these are distinct judgments and affect different persons."

Tidd's Pr. 1135.

2 Wms. Saund. 5 Ed. 46 a (6) 101, is *totidem verbis*.

2 Rol. Abr. 748–9; Cro. Car. 408, 451, 461.

(Note this case is *a* (*sic*) judgment against principal, and bail; they cannot join in error.) And see Lil. Ent. and cases cited. 2 Leon 201. 1 Ld. Raym. 328. Carth. 447 S. C.

Paddock's case, 6 Rep. 25, has already been stated to the effect, that from a judgment of outlawry against four, the proper proceeding in error is by separate writs, and a joint writ is improper.

Bushell, Hurstwayt & Brand v. Yaller, Cro. Car. 408, is in full as follows:

"Error of judgment in the common pleas by Bushell, the defendant, and Hurstwayt and Brand, the bail, in the common pleas against Yaller.

"Grimston assigned for error, that no capias was awarded against the principal, and yet a *scire facias* issued against the bail and judgment against them. It is now moved that this writ of error brought by the bail and principal, was not good, for they ought not to join in a writ of error; for the bail may not avoid the judgment against the principal by any error which is in the proceedings, and the principal hath nothing to do with the judgment against the bail. *All the Justices* were of *that opinion* except Berkley, who doubted thereof because, by the judgment against the principal, the bail is damnified, wherefore he conceived they should join in error to avoid the principal judgment. But he agreed that the principal ought not to join in a writ of error to reverse the judgment against the bail. And afterward he consented with the other Justices, that a writ of error lies not in this matter, wherefore it was abated."

In Cox v. U. S., 6. Pet. 172, a judgment was rendered jointly and severally against the estate of John Dick and Nat. Cox for $20,000 and costs, and judgment against Nat. Dick and James Dick for $10,000 each and costs.

"The judgment debtors severally sued out writs of error and separate citations were issued and served." Motion to dismiss denied.

Now if all the parties here were necessary to give the jurisdiction, one writ could not derive any aid from another suit.

Two suits in the same court cannot aid each other. Each must stand on its own bottom.

Then the decision is, that a joint and several judgment against four parties, may be brought up by writ of error separately, and that the non-joinder is not fatal.

This is the earliest case on the subject of non-joinder in the U. S. Supreme Court Reports.

Also this case shows affirmatively that neither party was unwilling to appeal, yet all this was held immaterial, and the motion to dismiss denied.

Hanrick v. Patrick, 119 U. S. 156, Anno 1886, Matthews, J. This case is distinctly in point upon the case before the court. It was a suit to try title to real estate. Intervenors came into the court who claimed under the plaintiffs, but adversely to them (claiming that the title of the plaintiffs had passed to them). Therefore, their title, though a perfect defense against the plaintiffs, was adverse to the co-defendants. Held, that they could maintain error, from a judgment in favor of the plaintiffs below, without joining their co-defendants. Though the judgment against the appellants and the other defendants below was single, yet it was upon different and distinct issues, and joint only in form and not in substance. There the co-defendants were exactly related, as Price and Ayres are here: co-defendant, adversely interested. There the *res* was the same also. The argument might well end here, for this case is on allfours with the present.

Next in order is the case of Todd v. Daniel, 16 Pet. 521, Anno 1842. Story, J. Appeal by five; four abandoned the appeal before any step taken in court of error; (case for summons and severance by common law). One was held without more, entitled to pursue the appeal. "Otherwise an irreparable injury might be inflicted upon him for which the law would not afford him any redress. The decree in this case is in fact against him as principal and against the other defendants in

aid of him, for distinct portions of the purchase money received by them, under the contract of sale made by Todd." * * "The decree may be entirely right in regard to the other defendants, and yet it may be erroneous as to Todd. He has, or at least may have, a distinct and independent interest in the controversy in respect to which he is entitled to be heard in this court."

The abandonment of the appeal by part of appellants was below, and part in the court above. This was treated as equivalent to severance.

This was a case on contract, and it is held to be in compliance with the rule requiring severance.

What the court holds as equivalent is this: "A part of the defendants who originally claimed the appeal, before any further proceedings, abandoned their appeal."

This does not show whether they did any affirmative act of abandonment, or merely failed to take active steps to prosecute it. What follows shows this latter is what the court means: "And the residue of them, excepting Todd, have since the session of this court abandoned their appeal, and Todd only has entered his appearance." Now, they could not have actively abandoned the appeal without an appearance, which is negatived by the statement. Besides, further on, the opinion says: "the appeal having been deserted" by all but Todd.

The original edition of the reports shows, in the statement of Mr. Davies, who moved for the appellee to dismiss the appeal, that there was no affirmative action. He stated that, "The appeal had been actually entered in the circuit court in the names of the appellants mentioned in the record; but that there were other defendants in the circuit court against whom the decree had been rendered, who had not joined in the appeal, not having any regular notice of such appeal. They were Hayes, Gouch and Westcott."

The abandonment by those joined below was by notice to complainants' counsel, and by no act in court. The counsel for defense says: "If others had withdrawn, or if some of these did not enter an appeal, the party who now asks to maintain it should not be injured by this condition of the case." These statements are wholly inconsistent with any affirmative action. In this case there was nothing of record to bar the right to subsequent appeal by the non-joining parties, and the acts *in pais* were subsequent to the appeal.

In Forgay v. Conrad, 6 How. 201, per Taney, Anno 1847, the court held that two defendants having appealed without four other defendants, the appeal was good, they having a separate interest.

The bill was filed by the assignee of a bankrupt to set aside sundry deeds made by the bankrupt, for fraud.

Among the deeds set aside is one to Ann Fogarty, who subsequently conveyed to Forgay. They appealed without the bankrupt or either of three other defendants, who held separate property by several deeds.

This is a case *ex contractu*, but the contracts are several; but it shows the plasticity of the rules of the court, when the substantial ends of justice are to be reached. It was a case where there was an award of execution in the court below for possession of two lots in New Orleans and sundry slaves fraudulently conveyed to appellants, and an order to the clerk and master to take an account of the rents and profits of the lots and negroes. The same relief, the same execution and the same order to account was entered by the same decree as to three other defendants who did not join in the appeal.

It was held that this was a final decree, and as the three other defendants "claimed other property conveyed to them at different times and by separate conveyances, it was not therefore necessary that they should join in this appeal."

In other words, the court holds that substance and not form must control.

The case of Brewster v. Wakefield cites Forgay v. Conrad, 6 How. 201 (1859). In this case the bill or petition was filed to foreclose a mortgage and collect two notes secured thereby, and the question involved was as to the proper mode of counting the interest due on the notes. Subsequent mortgagees or lienors were parties to the suit, and the decree settled their respective rights.

The question of non-joinder in appeal is made in the brief of appellees thus: "It is a case in which there are several defendants claiming in the same right, immediately or derivatively, against whom the same joint decree was passed, finally settling their rights, and the appeal is prayed by one only. An appeal will not lie in such a case by one." Citing Owings v. Kincannon and Todd v. Daniel, L. C. P. Co., Bk. 16, 302.

This statement of the points made by counsel is fuller in L. P. C. than in the original report.

The court, Taney, C. J., say: "Nor was it necessary that the parties who acquired liens on the mortgaged premises subsequent to the mortgage in question should join in the appeal. They were *not necessary in a proceeding in equity to foreclose the mortgage* and none of them have appeared to the suit to contest the claim of Wakefield." Citing Forgay v. Conrad, that a defendant in equity whose interest is separate from that of the other defendants, may appeal without them.

Here the court recognize the propriety of joinder in an original suit as the test of joinder in appeal.

Norwich & W. R. R. Co. v. Johnson, 15 Wall. 8, Anno 1873, Chase, C. J. This case is of no import. The question might have been important in the State Supreme Court, but in that court it was not noticed, and the appeal from that court to the Supreme Court U. S., was by and against all the parties to the decree appealed from. But if the non-joinder in the State

court appeal went to the jurisdiction, the decree was void. The court, however, do say that the trustee to secure bonds, was not a necessary party, as he had no interest. Yet he was the holder of the legal title, without whom the legal title could not be passed by the decree, and he could not be required to convey by a proceeding to which he was not a party.

Marsh v. Nichols, 120 U. S. 508, Anno 1887, is precisely on the same state of facts. Appeal by part to State Supreme Court, and by all who went to that court from a decree against all.

Milner v. Meek, 95 U. S. 252 (444) was this: Moore conveyed certain lands to Milner to hinder and delay creditors. Walker sued Moore in the State court and attached the lands conveyed to Milner. In 1870 Long sued Moore and attached the same lands. In 1872 Milner reconveyed the lands to Moore, and took a mortgage on them to secure a debt due to him. Subsequent to this sundry judgments were taken against Moore which were liens upon his equity of redemption, and in 1870 he executed a mortgage on the property to one Shepherd. Moore was adjudged a bankrupt in 1872, and Meek was appointed his assignee. Leave was granted Walker and Long to proceed to judgment in their cases against Moore, which they did. In 1873 Meek filed a petition in the bankrupt court, held to be a bill in equity, asking among other things that Walker, Long and many others be made defendants to the petition, and that the court order a sale of the property to satisfy the liens of the defendants after they had been adjusted. The case was referred to the register to determine the priority of the liens of the creditors. Walker, Long, Meek, Milner and other creditors filed answers. In 1874 the register made report against the mortgage of Milner, against the liens of Walker and Long, and he also reported the amounts and priority of other creditors. Milner, Walker and Long objected to this report. The court confirmed this report. Long, Walker and Milner appealed to the circuit

court. That court affirmed the action of the district court; and thereupon Milner alone appealed to the Supreme Court. And the assignee moved to dismiss the case because the other lien creditors who were parties to the proceedings below were not parties to the appeal. The court say in disposing of this motion: "Milner alone appealed. But his appeal brings up so much of the case and such of the parties as are necessary for the determination of his rights. The motion to dismiss is therefore denied."

In the present case Ayres alone appeals, but his appeal brings up so much of the case and such of the parties as are necessary to the determination of his rights.

City National Bank v. Hunter et al., 129 U. S. 557 (752). O'Neil, a cattle dealer, borrowed from Hunter, banker, as the latter claimed, $18,000 and gave a mortgage on his cattle. He also borrowed $9000 from the appellant's bank. Wanting to sell the cattle to Dawson, the four parties met, and it was agreed that O'Neil might sell to Dawson and that the two banks would share the proceeds of the sale pro rata. Dawson sold some $4000 or $5000 worth of the cattle, and then for the first time, as Hunter asserted, O'Neil disputed one-half of his claim of $18,000. Thereupon Hunter filed a bill in the State court claiming his right to repudiate the agreement upon the ground that he was being defrauded by Hunter and the appellant bank. The case was removed to the United States Court, where pending the suit O'Niel died, and his wife as administratrix was made a party. The circuit court held that Hunter was entitled to his $18,000, and the fund should be distributed accordingly between Hunter's bank and appellant bank. From that decree the City Bank and Dawson appealed, but Mary O'Neil did not appeal. The court say:

"It was proper to allow the bank and Dawson to appeal between themselves and Hunter bank, as with the matters

complained of by the bank and Dawson, O'Neil's estate had no concern." [Yet this was a joint decree and a single *res.*] "The total balance of indebtedness due from that estate, after all payments and money realized were applied, would be the same irrespective of the proportion of such balance found due to each of the creditors. The decree was severable in fact and in law, and the bank and Dawson were entitled to prosecute their appeal without joining their co-defendants, who did not think proper to question the judgment.

"And while, in order to a correct distribution of the fund, it becomes necessary to find the indebtedness of O'Neil to Hunter and to the appellant bank, this is not a determination of the amount remaining due after the distribution is made, with intent to decree against O'Neil's estate therefor, as the decree originally entered, so far as relates to that, stands unappealed from by either of the parties concerned."

Basket v. Hassell, 107 U. S. 602, Anno 1883, Matthews, J. Held that parties to a decree who had no interest in either affirming or reversing the decree are not necessary parties. "It is apparent that the sole controversy is between the present parties to the appeal," and the opinion proceeds to show this. It is not a case in point upon the present case except so far as it shows the spirit of the decisions, though in this sense it is in point here. Price has no interest whatever in reversing or affirming the judgment against Ayres. If it is reversed as to Ayres, it does not help Price; the case is ended as to him. If it is affirmed, he is no more concluded than he was before; it does not matter in the least to him who succeeds. If Polsdorfer has judgment, Price stands with a conclusive judgment below against him. If the case is reversed the conclusive judgment against him stands. If Ayres fails to reverse, he may still sue Price and recover against him in ejectment, if he has the better title to any land outside of the lines recovered by Polsdorfer. If he reverses the case Price would still have to give up to Polsdorfer. If on a new trial Polsdorfer fails to

recover against Ayres, then Ayres would still have to sue Price for the land that Polsdorfer has not recovered from Price. In no possible event has Price any interest in this controversy.

But this court is not sitting to protect Price. Price is not one who asks its aid. If this court requires him to come into this case and will not proceed without him, it is not from any solicitude about him or his interests—it is the parties before the court that this court is acting for and between. If a party is not joined as co-plaintiff who ought to be, the court dismisses the case, not on his account, but on account of the defendant in error, plaintiff below, because for want of Price his judgment will not be as beneficial to him as it would be if he, Price, were here. But how could Polsdorfer be benefited by bringing in Price? Suppose Price was here and he could maintain his claim against Polsdorfer. Would that do Polsdorfer any good? Suppose he could not, would a judgment of affirmance here as to Price be any more conclusive as to Price than the unappealed judgment below? If we are right, and the protection of the adverse party is the ground of the rule that the parties must join, then his protection is more complete by the omission than by the joinder.

On the other hand if the court *is* solicitous about Price and he is a dead cock in the pit, what harm is done to him? We cannot make him any deader by either success or failure. He can gain nothing by our success, he can lose nothing by our failure. What does Polsdorfer want with him? To be reversed by him and give him another chance? What does he lose by not having him? As he is, Price is squelched effectively and forever. But, he says by this motion, I have the right to have him here. This court must say to him, his absence here can by no possibility do you any harm, but his presence may do you much harm. It may put to hazard what you have now settled against him. In any possible event it

cannot make a judgment more obligatory, conclusive or final than the one you now have. What do you want with him? O, I just want to get rid of Ayres. But you can't get rid of him because you want to, though you may if the absence of Price is an injury to you—if his presence is necessary to enable us to do you full justice. Here, his absence is a benefit. Price cannot be injured by any judgment here; his case is cooked already. He is entitled to no benefit here; he has not asked it.

Held in Birdsong v. Birdsong, 2 Head 289, 302, not to be a right of the party, but a rule prescribed by the courts to themselves.

But it may be said in reply: What you say is true, but it was not so when you took the writ of error; and this is true. But is it an answer? Does not this motion to dismiss reasonbly demand an existing right to the relief asked? Every word of our reasoning applies to the state of the case as it was when this motion was made. If it had been made at the first term, when it was possible that Price might still bring error, there then existed a benefit to Polsdorfer to be derived from the motion to prevent a separate appeal by Price, but when the motion was made that benefit was precluded by the extinguishment of Price's right to a writ of error. Shall he have a remedy of which the purpose has wholly vanished, when he did not ask for it while it would have answered a purpose? The technical rule as to pleas in abatement is founded on reasons weak compared to this. A remedy must be used while some remnant of the evil continues to exist.

But further, Price took no bill of exceptions. From the time then that execution could issue, *i. e.*, the end of the term, Price by that failure was precluded from a writ of error.

Gilfillin v. McKee, 129 U. S. 303, Anno 1895, Brown, J. In this case the motion to dismiss was denied on the ground that the interests of the parties who were not joined in the appeal were separate, although they were so far connected

that no complete decree could be made on the appeal, but it had to await the adjustment of part of the matters in the same case involved in another appeal in which the non-joining appellants were concerned.

The appeal involved this: A large fund had been recovered and had gone into the hands of one McKee. A part of this fund had been appropriated by the beneficiary to the widow of one of the agents who, under a conditional contract to be paid compensation if he recovered the fund, had rendered valuable services but did not live to recover the fund, and so was entitled to no compensation legally. The administrators of that agent claimed that the amount allowed the widow was really compensation and ought to go to them; the widow claimed that it was gratuity and belonged to her; held, that the widow, administrators and the holder of the fund were the only parties necessary to the appeal.

Two other parties, Lamon and Latrobe, were jointly interested with the widow, as they were adjudged by the decree to be entitled to part of the fund adjudged to her. But she did not deny their interest—did not appeal from that part of it, and they did not join in the appeal, although they were jointly interested in the fund to be recovered. But the amount of their compensation was involved in another appeal from the same decree, and the court say: "The reversal of the following case may make it necessary to readjust the amount due to *Lamon and Black*, and consequently our decree on this case must be for a reversal to await the disposition of the following case and for further proceedings in conformity to this opinion."

It is hard to conceive any case stronger than this in favor of making exceptions to the rule. In fact, it disregards the whole basis of the rule; the delay of the adverse party; the tale twice told to the court; the inability to make a complete decree; the identity of the *res*; all but the consideration that

the court will not on technical grounds turn parties out of court without a decision on the merits. In other words, this case does not seem to leave the rule a leg to stand upon, except where the interest grows out of partnership or a joint contract. And the case is distinctly conclusive against the position that the singleness of the *res* is a ground for the application of the rule; in fact, every case reported in which the motion has been denied is a case in which the *res* is single.

Germain v. Mason, 12 Wall. 259. Germain and eighteen others were defendants. The suit was to recover a balance due by Germain, and to enforce a lien against a house and lot for work done and materials furnished to Germain in building the house. The other eighteen defendants were made parties in the lower court, because they claimed to have some interest, claim or lien in, or on the encumbered premises; and they were prayed to be bound and foreclosed of all equity, etc. The court decided that the lien of the plaintiffs was superior to that of all other persons, and gave judgment *in personam* against Germain for the debt and for a sale of the property on which the lien was claimed, and that out of the proceeds payment should be made to the plaintiffs. Germain sued out a writ of error without joining the other defendants, and it was held that he could properly do so. Here the *res* was the same, and the eighteen unjoined defendants had a claim upon the fund.

In R. R. Co. v. Johnson, 15 Wall. 8, a holder of bonds, secured by mortgage on the railroad, and by the transfer of stock to two persons as trustees, sued in equity praying a foreclosure of the mortgage and a sale of the stock, the railroad company and the trustees being defendants. There was a decree against the company or mortgagor, personally, and against the other defendants trustees, and it was held that the railroad company could maintain an appeal from the decree without joining the trustees. Here the *res* was single.

We have examined, as we think, all the cases reported on this question from the circuit courts of appeal—eighteen in number. Of these, seven distinctly hold that persons more connected than Ayres and Price need not join, and deny the motion to dismiss. Eleven cases hold that the interest of the parties below is such that the decree cannot be complete without concluding their interest, or completely guarded without hearing them; and the motion to dismiss is allowed. The seven are cases distinctly maintaining our contention. The eleven are perfectly consistent with it, and inconsistent with the opposite view in this, that they all assume the necessity of showing a common interest.

But we find in one case an opinion by Jenkins, J., which ably reviews the cases and follows the rules as administered in the latest cases in the Supreme Court. This is the case of the L. & N. R. R. v. Pope, 74 Fed. R. 1, from which we quote:

"The order allows the appeal 'to said defendants above named' to operate as a supersedeas upon giving bond in a specified amount. It does not appear from the record that Morris Sharp, trustee, or Erastus W. Hubbard, were in any way notified of this petition, or were in any way asked to join in the appeal, or that they or either of them refused to join therein. Without doubt all parties to a joint decree in equity must join in the appeal, unless upon notice the court grants a separate appeal to a single party. Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39; Beardsley v. Railway Co. 159 U. S. 123; 15 Sup. Ct. 786. But if the decree be several in form or substance, and the interest represented by each defendant be separate and distinct from that of the other, any party may appeal to protect his own interest. Gilfillan v. McKee, 159 U. S. 303, 312; 16 Sup. Ct. 6. The reason of the rule is stated to be, first, that the successful party may be at liberty to proceed to enforce his decree against those not desiring a review; and second, that the appellant tribunal shall not be required to decide a second or third time, the same question in the same record.

"The precise question here is substantially this: Whether a decree establishing a lien upon real property is to be deemed joint or several as between a mortgagor and a mortgagee of the property, so that either may appeal from the decree without joining or without severing as to them. In Brewster v. Wakefield, 22 How. 118, a bill was filed to foreclose a mortgage upon real property, to which subsequent lienors were made parties. There was no defense by the appellant (the mortgagor), but by his appeal he presented a question with respect to the rate of interest that the debt should draw after its maturity. The defendants who held subsequent liens upon the premises were not parties to the appeal; but there was no severance as to *them*. The court held (Mr. Chief Justice Taney) that the subsequent lienors were not necessary parties to the proceeding, and had not appeared to contest the claims of the complainant; and that, had it been otherwise, the question in controversy was the amount of the debt due from the appellant, and upon the authority of Forgay v. Conrad, 6 How. 201, held that the decree was separate, because the interest of the appellant was separate from that of the other defendants. In Germain v. Mason, 12 Wall 259, the suit was brought to recover for work and materials furnished to a building, and for the establishment of a mechanic's lien thereon, prior to other lien claimants who were made parties defendant. The court ruled that Germain, the owner, might appeal alone without the presence of the other lien claimants, notwithstanding that the debt of the complainant was decreed to be a paramount lien on the realty, as against all other defendants. So, also, in Milner v. Meek, 95 U. S. 252, suit was brought by an assignee in bankruptcy to sell the land of the bankrupt, and for the adjustment of the liens upon the land against all lien claimants and general creditors. The decree determined the amount and priority of the several liens. It was held that one lien claimant might appeal without the presence of the other.

"The question is discussed in a well considered opinion by the Court of Appeals of the sixth circuit, in the case of the Mercantile Trust Co. v. Adams Exp. Co., 16 U. S. App. 37, 69, 7 C. C. A. 3, and 58 Fed. 6, in which the authorities are

assembled and reviewed. Here the decree established a lien upon the railway in question, and adjudged that all rights of the Louisville, New Albany & Chicago Railway Company, and of Morris Sharp, trustee, were subordinate to that lien. It does not provide for any enforcement of the lien established in case of failure of the railway company to pay the amount decreed, but reserves the right to the complainant, in case of non-payment within a specified time, to apply to the court for further direction. It appears that the short line of railway involved had become incorporated into the through line of the Louisville, New Albany & Chicago Railway Company, between Chicago and Louisville. Whether, upon default in compliance with the decree, the court would direct a sale of the railway, or would take it into possession and sequester the revenues to the satisfaction of the decree, had not been determined by the court below prior to the appeal. So that, whether in fact Sharp, as trustee under the trust deed, was injuriously affected by the decree, would depend upon the nature of the ultimate proceedings to secure satisfaction of the decree. If such should be obtained through sequestration of the revenues of the road, and without sale of it, the trustee would not be injuriously affected. It may be said that it is clear upon the record that Sharp, as trustee, did not contest the complainant's right, but contented himself with asserting the trust deed against the appellant who held nearly all of the bonds, and in favor, as they state, of but two bondholders. The decree is in substance one against the railway company—establishes the claim due, and that in default of its payment the lien granted would be enforced against the property upon which the trust deed existed, and in some way to be thereafter determined. The case seems to be clearly within the rulings in Brewster v. Wakefield and Germain v. Mason. Sharp, the trustee, in no way excepted to the master's report, or to the decree so far as it determined the rights of the complainant below. Any appeal by him to review the decree in favor of the complainant would necessarily prove abortive. To join him, therefore, as an appellant would be useless, and the formality of severance would seem to be unnecessary. We think this decree to be so far separate that

an appeal was authorized without the joining of Sharp, trustee, as a party thereto, and without proceedings for severance. With respect to the defendant (Hubbard) it is only needful to say that the trust in him would seem to have been fully performed, and all interests of which he was trustee, vested in the present appellants. He has no possible interest in the controversy, and did not appear to, or defend against the suit; he is not a necessary party to the appeal. The motion to dismiss will therefore be denied."

Observe, the court says as to Hubbard: "The trust in him would seem to have been fully performed, and all interests of which he was trustee vested in the present appellants."

Observe also—as Sharp did not except—so Price took no bill of exceptions.

Now where is Price's interest? Is it not vested in Polsdorfer by his judgment below, or extinguished so far as Polsdorfer is concerned? If it is conveyed as by fine and recovery, Polsdorfer, as assignee of Price, represents and can protect that interest, and it behooves him here to support and prove Price's title as against Ayres. If it is extinguished by a final conclusive judgment of its nullity, then surely a nonentity needs no party in this court to represent it.

Take another view: Suppose Ayres and Polsdorfer were to meet and a compromise were proposed. Some one might ask, what will you do with Price? Polsdorfer would say at once, my judgment against Price stands; he can never question what I do. Ayres and I are all the parties needed to compromise this matter, and our settlement concludes the whole world. Polsdorfer can sell, give away, or at his will dispose of any claim that Price ever had. He stands in his shoes to all intents and purposes. Still, he wants him here to enable the court to do him, Polsdorfer, complete justice!!!

There is still another class of cases in which the Supreme Court discuss separate interests. These are cases where the

question is whether the interests of several plaintiffs against one defendant, or the interest of one plaintiff against several defendants, each severally liable for a separate sum, under the jurisdiction of the court of error, can be added together to make a sum sufficient to give jurisdiction, and the principles of joint interest and joint decrees or judgments are clearly set forth.

In Paving Co. v. Mulford, 100 U. S., at page 148 (591), Ch. Justice Waite says:

"We think it clear that we have no jurisdiction in this case. Although many defendants have been brought into court, the proceeding is, in fact, against each of the several purchasers, to enforce his separate and distinct liability. It is a joinder of distinct causes of action against distinct parties. The same decree is to be entered against each, as in case of separate suits. The recovery, if any, must be against each defendant separately, for the amount he may personally be found to be accountable. Such being the case, the value of the matter in dispute with each defendant must be the sum for which he is separately liable. It is well settled that neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on an appeal. Seaver v. Bigelow, 5 Wall. 208 (595); Rich v. Lambert, 12 Wall. 347; Oliver v. Alexander, 6 Pet. 143; Stratton v. Jarvis, 8 Pet. 4.

"In such case the appeal of each separate defendant or complainant must stand or fall, according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. * * * For the purpose of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount invoked sufficient to give jurisdiction."

REVIEW OF THE CASES IN U. S. SUPREME COURT In Which Joinder Was Held Necessary.

The first reported case on the subject of non-joinder in error is Cox v. U. S., 6 Pet. 172. See supra p. 10.

The next case is Williams v. Bank, 11 Wheat. 414, Anno 1826. Error by one of several defendants upon a joint judgment in a joint action against them for money lent. Writ of error dismissed. Webster for motion; per Marshall, C. J. This case was *ex contractu*. No report of argument or reasons.

The next case was in 1833—Owings v. Kincannon, 7 Pet. 339. Six defendants were directed to convey and release to the complainant all their right, title and interest in a tract of land. Appeal dismissed.

This was evidently a suit *ex contractu*, in which the defendants were jointly bound to convey the land, as such decree could not have been upon an action *ex delicto*. It was most probably on a joint title bond, on which at common law all the contracting parties must have joined and been joined.

Deneale v. Archer, 8 Pet. 526, Anno 1834; per Marshall, C. J. *Scire facias* to revive a judgment. Judgment for plaintiff against Mary Deneale and several others. Writ of error by Mary Deneale "and others" (*sic*) held bad, but the court said they could have a new writ; and so by consent the writ was amended and decree for plaintiff in error upon the merits.

This is pretty strong against the question being jurisdictional, for objection to the jurisdiction cannot be waived. It is strong, however, that it was jurisdiction of the parties, which can be waived.

Deneale (Wilson's Heirs) v. The L. & F. I. Co. of New York, 12 Pet. 140, 1838. Held that writ of error by "the heirs of Wilson" is bad, and all the defendants not having joined, the

case must be dismissed. In this case the idea that the defect goes to the jurisdiction first crops out.

But this is exactly the case of U. S. v. Schoverlin, 146 U. S. 76, where the court held that in case of partnership, appeal in the name of A. B. & Co. could be amended. It is also directly against Deneale v. Archer last above considered.

There the suit was to foreclose a mortgage, and the right of the defendants was clearly joint. Per Taney. Baldwin dissented.

Smith v. Strader, 12 How. 327, 1851, does not show the nature of the suit, whether plaintiff or defendant was plaintiff in error.

Davenport v. Fletcher, 16 How. 142, 1853. Probably ejectment or a possessory action equivalent. La. Joint recovery.

Fletcher et al. v. Davenport et al., How., &c. Bond to an assignee who was not a party to the suit. Dismissed.

In Shannon v. Cavazos, Bk. 15, L. C. P. Co. 929, court held that a separate appeal by one party from a decree against several was not maintainable, but the subject matter of the decree and the nature of the interests in no way appear. This is not in the official reports.

Mussina v. Cavazos, 6 Wall. 773, Anno 1868, merely holds that an appeal with proper parties which does not show which was plaintiff and which was defendant below, is good. But it does show that the rule should be administered in the interest of justice, as does also Masterson v. Howard, 77 U. S. 416. Decree against two; one appealed. Bill to perfect title.

Downing v. McCartney, L. C. P. R., Bk. 19, 757, Anno 1870. Chase, C. J. Decree below dismissing bill filed by three; appeal by one; held bad and dismissed.

Here was a case in which the plaintiffs below were necessarily appellants. They had joined below. They had made

themselves joint parties and could not well deny that they ought to work together under the yoke they had voluntarily put on.

In The Protector, 11 Wallace 82, Anno 1871, Nelson, J., Swayne and Bradley dissenting, the appeal by one libellant in an admiralty case, whose joint libel brought by him jointly with others, was dismissed; one could not appeal alone. Of course if the libel was brought by parties who were necessarily joined, the same necessity would exist that they join in the appeal. Even if they had improperly joined, the common law would have bound them to abide by the consequence of their own folly. Estoppel by mistake, Popham, J., in 6 Rep. 25 supra. The two dissenting judges, however, held that it ought to be amended under the act of 1789, 1 Stat. at L. 73; and Congress in 1872, C. 225, have passed a more liberal act applicable to appeals in admiralty.

Hampton v. Rouse, 13 Wall. 187, Anno 1872, ejectment, merely states the rule; no facts reported except that the verdict, judgment and bill of exceptions were joint, and plaintiff in error is one of two defendants below. Chase, C. J.

Simpson v. Greely, 87 U. S. 152, Anno 1874. This was ejectment against landlord and tenant jointly for possession and for $4200 against landlord and $2600 against the tenants' part of the $4200. Clifford, J., dismisses the cause because the interest affected is joint, but says: "Cases arise beyond all doubt where only one of several defendants is affected by the judgment or decree, and it is well settled that in such cases the party whose interest only is affected by the alleged error" may proceed alone.

Feibleman v. Packard, 108 U. S. 14, Anno 1882. Partners sue. Decree against them and part appeal. Held bad. The court say: "While parties against whose joint interest a decree is rendered must join, yet they show by the use of the

words, 'if the judgment affects them jointly and not severally,' that the exception to the rule exists." This is a case where limitation in the statement of the rule shows the exception.

Ex parte French, 100 U. S. 1, Anno 1879. Waite, C. J. Ejectment, but concerns separate interests in stay of execution for money judgments, and discusses severable interests in that connection, and holds against the objection that defendants with severable interests shown in the record were improperly joined. One matter in this case pertinent to the present is that stay of execution by one leaves execution free to issue against the other.

Mason v. U. S., 136 U. S. 581, Anno 1890. Joint judgment against McArthur, postmaster, and his securities. Writ of error by Mason, one of the sureties alone, dismissed and held to be unamendable. This was a joint liability *ex contractu*, and the writ of error was not even by the principal in the bond, but by one of the five joint sureties.

U. S. v. Schoverlin, 146 U. S. 76, Anno 1890, the defect of defendants in error, described as a firm, was held amendable, citing Estes v. Trabue, the statute of amendment of 1872, C. 225.

Hardee v. Wilson, 146 U. S. 4, 1892. Appeal by one of several joint defendants from a joint decree, dismissed; suit to set aside two deeds as fraudulent as to creditors. But this is in equity.

Nash. v. Harshman, 149 U. S. 263, 1893, C. J. Fuller, dismissal, because the decree below was not final; which is the point decided in the case cited as the authority. Hohorst v. Hain, A. P. Co., 148 U. S. 383.

Inglehart v. Stanbury, 151 U. S., Anno 1894, was an appeal without the parties having the material interest in the decree, and the appellants had no interest—dismissed.

Davis v. Merc. Tr. Co., 152 U. S. 590, Anno 1894. Brewer, J., two appeals dismissed on the ground that the parties in

interest against the reversal, were not made parties to the appeal, though they had a preponderant interest. In fact, it was impossible to make a full decree without them, the ordinary rule, "that all parties who appear to have any interest in the order or ruling challenged must be given an opportunity to be heard."

Beardsley v. Ark. R. W. Co., 158 U. S. 123, Anno 1895. Appeal by one defendant in decree below without making complainant a defendant to the appeal, but merely making a co-defendant a defendant to his appeal—dismissed.

Sipperly v. Smith, 155 U. S. 86, Anno 1894. Fuller, C. J. Appeal by Sipperly, second creditor, secured by a trust deed; property conveyed by the debtor in fraud of creditors, attached by creditors. To this bill it seems that trust creditors were not made parties, for they came in jointly as intervenors by bill, asking that the deed be held valid—decree that it be held invalid.

Appeal by second secured creditor, and intervenor without first creditor and joint intervenor; and the appeal was not against the makers of the deed—held bad.

Wilson v. Kiesel, 164 U. S. 248, Anno 1896, Fuller, C. J. Wilson appealed, as to three defendants in error out of thirty odd, from a decree "as to all of them on a ground common to all." The case was one of contribution to make up a sum for which they were liable pro rata, and the amount each was to pay depended upon the amount each owed on subscriptions of stock. Of course, no one could be brought up separate from the others, as this would make it impossible to make a complete decree. This was a non-joinder of necessary defendants in error.

It would seem needless to go further with this argument, but the conclusion to be deduced by a discussion of the principles involved seems to be as clear as the preponderance of

authority. First, then we insist that the objection is to matter of form cured by the Statute of Amendments.

Matter of Form.

A writ of error is a suit brought in a court of error. The adverse party objects that a proper plaintiff is not joined. Why should the party in the court of error not have his summons to the necessary co-plaintiff to have him come in and join in the suit, and in case he refuses order the severance just as the court below would in the suit originally brought there? The case below is ended. The judgment there is that the parties go hence without day. The only case pending is the new suit by writ of error. And it would seem to be an inevitable consequence that the court in which the case and the only case is pending, should be the court from which the summons should issue to authorize the severance.

If the writ of error by one stops the execution as to all (why should it? In fact it does not. Ex parte French, 100 U. S. 1. But one objection to non-joinder is that it delays by successive appeals), does it not necessarily result that the process by which it is cut loose must issue from that court by which it is stopped, and be directed to the court below and require them to proceed as to the others?

A *quare executionem non* issues from and is returnable to the court in which the cause is—the court of error. If it issues the writ by which the defendant in error, plaintiff below, can have his writ of execution, why cannot the same court issue the summons to a party who refuses to allow his name to be used? If it can act on one party, why not the other? If it can issue a writ incidental to the jurisdiction in one case, why not in the other? If it can issue a writ *quare executionem non habere*, why not summons and severance?

If the joinder of parties is required because no proper judgment in the cause can be pronounced without them, then their

joinder is matter of substance necessary to the attainment of justice. If they are not necessary to the adjudication of the rights of those before the court, but only to make a conformity of one part of the record to another part of the record, then it becomes matter of form and not of substance.

Further: If a party can be joined without authority and against his will and then be summoned and severed in the court of errors; or, if without joining him he can be summoned and severed in the court below, it results that the difference is matter of form and not of substance.

From this it appears that if two ought to join in error, and one without the authority of the other, or in defiance of his refusal joins him in the writ, then when he fails to come into the court of errors the one plaintiff may apply to the court of errors for his summons and there have judgment of severance. But if plaintiff in error is not willing to use the name of the other wrongfully he cannot have that remedy, but must go back, commit a breach of propriety, unlawfully use the name of another against his will, get a new writ with his name in it and then summon him, and behold he is justified and can have due remedy. In other words, if the court below chances not to be in session the only remedy is to violate the law by a fraud on the court—a lie upon the record—say both complain when one does not, and then in virtue of the praiseworthy fiction he is *rectus in curia*.

Now, is there any substantial reason in *rerum natura* why the truth would not answer as well as the lie? Why, when he won't come the other should not say so to the court and have his summons—as well as for him to say, I have him here but he won't go with me any further, and I want you to cut me loose from him? What is this but form, not substance?

Rather than adopt the natural presumption that a man who doesn't take a bill of exceptions and appeal, doesn't want to, the court sacrifices the right of his co-defendant or plaintiff who

fails to fortify this natural presumption and make it certain to a certain extent in particular, by putting it upon record.

Yet, in the case where it is absolutely necessary to the complete adjudication of the rights involved have the parties before the court, they dispense with it if the form is pursued of calling him into court and putting upon the record, "he says he won't." This shows that it is a matter of form and not of substance. This form is wholly disregarded by Story in Todd v. Daniel, and abandonment and desertion held sufficient 16 Pet. 521; ante p. 11.

Amendments.

The U. S. statutes of amendments enact that "no summons, writ * * * process * * * or other proceedings shall be abated, arrested, quashed, or *reversed*, for any defect or want of form. But the courts shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects or want of form in such writ, * * * return, process, judgment, or course of proceeding.

"And they shall allow all amendments except such as have been pointed out by demurrer, and may at *any time* permit either of the parties to amend any defect of the process or pleadings as the courts respectively shall, in their discretion and by their order, prescribe."

Brightly Dig., Title Amendments.

The word "reversed" clearly applies this remedy to courts of error.

It is held to apply to courts of error in The Edward 1 Wh. 261. It was held in Kennedy v. Georgia Bk., 8 How. 611, case in equity, to allow a vital amendment (jurisdictional), and by *consent* the amendment was made in the Supreme Court. Held to be not jurisdictional. This case cites 1 Gal. C. C. 22. Also Bradstreet v. Thomas, 12 Pet. 64; and this case when referred to, shows the favor shown to mere defects not affecting the merits.

It is held to allow the introduction of new plaintiffs in error by amending the writ of error in the Island S. C. Co. v. Tolson, 136 U. S. 572.

Estes v. Trabue, 128 U. S. 225, was cited in the above case; citizenship not averred cured by admission in demurrer. It was also cited in U. S. v. Schoverlin, in which it was held that an appeal prosecuted in the name of a firm was amendable, and the matter was amended and decision on the merits, per Blatchford, who decided Estes v. Trabue. This was a case on a bond. Joint judgment against principal and two securities. "There is nothing distributive in the judgment" so that it can be considered as separate as against claimants and against sureties.

In the case of Mason v. U. S., 136 U. S. 581, the court held the omission not to be amendable.

In U. S. v. Schoverlin, 146 U. S. 76, Anno 1892, an amendment was allowed by inserting names of defendants in error in a writ against them as a company; partnership.

Owings v. Kincannon, 7 Pet. 399; two out of six parties united in interest under a joint decree dismissed in analogy to rule at law and also on the principle of need to join all parties necessary to one decree final as to all. Marshall, J.

Moore v. Simonds, 100 U.S. 145, appeal in prize case in name of firm amendable.

In Pearson v. Yewdall, 95 U. S. 236, it was held that the city of Philadelphia was the only necessary party defendant and the writ not being against her was bad. The plaintiff in error and defendant were on the same side of the case. Opening a street.

In Knox v. Castello, 3 Burr 1789, *Scire facias quare executionem non* is only a writ to bring the plaintiff in error to assign his errors; he comes in upon it and assigns his errors. Therefore he waived any objection and admitted the one executor to be sufficient to call upon him merely to assign errors.

He might, perhaps, have moved to quash it, but as he did not challenge it he has waived the objection to it; "and we are not to presume the other executor to be alive."

This shows the matter to be waivable or amendable.

In the same case Yates, J., cites Hackett v. Heme, Carthew 7, that "writ of error by one alone, on a judgment against two, is not good. But that is on account of the inconvenience that would arise from perpetual delay of the execution, if every defendant might bring a writ of error by himself. Now that reason does not hold in the present case, where these executors are defendants in error and not plaintiffs."

This is the only reason given in the English cases, we believe.

This shows clearly that it is not the mere correspondence of parties above with the parties below that is the ground of the rule. For if that was material it would not be material as to plaintiffs in error, and immaterial as to defendants. It is to prevent interminable delays of the execution. This was when the limitation of writs of error was twenty years. This delay can be prevented by summons and severance. It can be done by writ of *quare executionem non*—that is, a writ calling on the defendant to show cause why the plaintiff should not have execution against him for some defect in his proceeding—but if the plaintiff in error can have a writ in the court of error to have execution, can he not have the same writ below, for the reason that one party has taken a writ of error? Is it a recognized writ—common law process? The case is not inseparable, for it does not apply to defendants in error. If it was inseparable it would all go up on error by one, and the writ *executionem non* would issue there, or if it was separable one part would remain below and the *executionem non* would issue from the court below. If the co-defendant (plaintiff in error) can have severance, why not let the plaintiff below have *executionem non?* That would be a simple solution of the

whole matter. And this shows that it is a matter of form and not matter of substance.

In the present case no execution is awarded but for costs. The judgment on the main question is merely declaratory of title. Record page 11, 2 lines from foot of page. There is in effect nothing to supersede but the judgment for costs. The plaintiff below is not delayed of anything but his judgment for costs. As to the judgment for costs, it cannot be joint, and does not purport to be in this case. Each, it is true, is liable for the whole costs of the plaintiff below, but the liability for costs is several, and if it all be levied of the property of one, or paid by one, he can have no contribution from the other, any more than he could have if the costs had been incurred and adjudged in two separate suits.

Anderson v. Saylor, 3 Head 552 Tenn.

Rhea v. White, 3 Head 122.

If the joinder of parties is required because no proper judgment in the cause can be pronounced without them, then their joinder becomes matter of substance necessary to the attainment of justice. If they are not necessary to the adjudication of the rights of those before the court, but only to make a conformity of one part of the record with another, then their non-joinder is matter of form, as much as an addition of gentlemen, instead of laborer, and is as much to be disregarded or amended.

See dissent in The Protector, 11 Wall. 82.

Germain v. Mason, 12 Wall. 259, shows that the rule does not require as a mere matter of course, that all parties in a suit shall join in a writ of error to reverse a judgment. That it is not merely technical, but that it regards the substantial right of the plaintiff in error to the reaching of which, the co-defendants are such parties that a complete judgment—a complete determination of the case—can not be made without them.

This suggests a probable solution of the whole rationale of the rule. And it is a rule which runs through the law of procedure everywhere.

When a case is made in which the rights of parties not before the court is so involved, that the rights of the parties brought in, cannot be determined and settled without bringing other parties before the court, and no decree or judgment can satisfactorily be pronounced without them, then the court will peremptorily require the needful parties to be brought in, or else refuse to act. But in this case the courts of the United States have on account of the limitations upon their jurisdiction modified strict rules, and dispensed with parties, of whom personal jurisdiction could not be obtained, if they could administer even partial, incomplete justice. 1 Kent Com. 346 n d.

If the rule relied on in this case is administered in this spirit, and applied to cases in which parties are omitted necessary to a judgment or decree, complete and perfect as to the parties before the court, then it becomes a rule having reason and substance to support it—beyond a mere unsubstantial adherence to form. It will be found upon the review of the authorities that this view is fully sustained.

See Basket v. Hassel, 17 Otto 602, per Matthews.

In Cox v. U. S., 6 Pet. 172, the decision is wholly inconsistent with the idea that the writ of error is the warrant which gives jurisdiction. There a judgment was rendered jointly and severally against the estate of John Dick and Nat. Cox for $20,000 and costs, and judgment against Nat. Dick and James Dick for $10,000 each and costs.

"The judgment debtors severally sued out writs of error and separate citations were issued and served." Motion to dismiss denied.

Now if all the parties here were necessary to give the jurisdiction, one writ could not derive any aid from another suit.

Two suits in the same court cannot aid each other. Each must stand on its own bottom.

Then the decision is, that a joint and several judgment against four parties, may be brought up by writ of error separately, and that the non-joinder is not fatal.

This is the earliest case on the subject of non-joinder in the Supreme Court Reports, and this is all fours with Cro. Car. 408.

Is not the rule founded on the same principle that all parties "materially interested either legally or beneficially in the subject matter of a suit, are to be made parties to it * * * so that there may be a complete decree which shall bind all?

Sto. Eq. Pl., sec. 72.

And does not this mean, as the court say in Gregory v. Stetson, 133 U. S. 587–794, that the court may "be enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits and to make it perfectly certain that no injustice is done, either to parties before it or to others who are interested in the subject matter, by a decree which might be grounded upon a partial view only of the real merits?

1 Dan. Chy. Pl. & Pr. 246.

Jurisdiction.

What are the essentials of jurisdiction?

The true view as to jurisdiction seems to be this:

Premising a court of general jurisdiction, that is, the general right to try causes, there are four essentials to the right to try a particular case:

1st. That the subject matter is within the powers of the court.

2d. That there be a cause of action existing.

3d. That the plaintiff, whether one person or more than one, shall completely represent a complete cause of action.

4th. A party defendant against whom the cause of action exists.

If you have these you have a cause which the court has the right to try—jurisdiction.

If you need any more, we have found no good authority for it.

The jurisdiction of a suit in error depends upon the writ just to the same extent as it does in any other original action.

Blackstone says, Vol. 3, p. 273, the original writ "is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause." Just what Tidd says as to the writ of error.

The strongest possible statement for the holding that the joinder of a party is a matter of jurisdiction would be this:

If parties fail to join in an action on contract, the court does not obtain jurisdiction of the joint, the duplex party, and so cannot proceed with it for want of the proper parties. The whole thing, *i. e.*, whole right to be litigated, is not before the court. The right of action here is regarded as an indivisible unit. That unit must be represented. If the interest in, *i. e.*, the right to that indivisible unit, resides in several distinct persons, each vested with an interest in all and every part, the unit is not before the court unless all of the persons are. So in contract if you are bound to two persons, they must join to sue for it; otherwise the thing, the unit, the cause of action, is not before the court, and the court has not the jurisdiction of the case. But this could only be sound if that unit was in the last analysis inseverable; but even in contract it is severable by summons and severance.

Passing this, however, as correct as to contracts, if the right to sue for a trespass is a wrong to two, it would be subject to the same rule. But the whole theory of the common law is against the idea that a wrong to one person can be a wrong to another. If, as said above, A with one sweep of his staff strikes B and C, the injury which B receives does not enter

into the damages that C has sustained, and is no part of his right of action, and *vice versa*.

So if A and B are tenants in common of a tract of land, they each sustain a several injury by a trespass upon it. If A sues for the injury that accrues to him by a trespass to the land, the unit which the right of action is, is complete in him, and he may maintain the action. His injury is not B's injury, though it is an injury to the same tract of land.

Now, when we come to the writ of error, the question is the same. The injury complained of is the error of the court as it affects the plaintiff in error. The right of action is a unit. Now, is it a right in which another has an undivided interest, and which is not completely represented by either one, or by both separately? If the error which is a wrong to A does not affect B or is right as to him, it is plain that the unit, the right to legal redress for that error, is in A, and not at all in B. But suppose the same charge affects them both in *totidem verbis*, what then? Let us take the proposition to pieces. "Gentlemen of the jury, the court charges you that A and B set up a defensive title; they have no such title." That looks like a joint wrong, but is it? "They" consists of two parts, A and B. Suppose we put it: The court charges that A's defense is naught; B has no right to except to that; he is not hit or hurt by it. It also charges that B has no defense; now this is no injury to A, and he cannot except to it. The charge, joint in form, operates just as severally and respectively as the several charges; in fact, being resolvable into parts, it is in law a several charge, and joint only in form. Now, to so much of it as injures A, B has no right to except, and *vice versa*. It is merely the same stick which hit both, but the hurt is not the same, and the unit, cause of action in error, is not the same in A that it is in B. If they join in error the defendant cannot object, for he has yoked them together. But it is the case of the four outlawed in one judg-

ment; they have their election, but if two free themselves of the yoke, that end drags and they must all go out together.

The question of jurisdiction then is simply this: Is there a complete cause of action here completely represented by a party who alone, without aid from any other, fully represents it? If so, the jurisdiction is complete.

And this admits of one result, and one only. There is in this judgment an injury to Ayres, which affects no one but Ayres, which is therefore a complete cause of action in him, which needs no other to represent it, and therefore the jurisdiction is complete.

No sooner had the early jurists practically worked upon this idea than they discovered that there were circumstances where one necessary part of that representation might act to the prejudice of the person who desired judicial redress, and they at once made an exception to cover such exceptional cases. Summons and severance—a summons of course, with a judgment of course, involving no actual judicial action or discretion whatever—by which there was put upon the record that which might just as well have been presumed.

But it may be and has been said that by refusing to join, the non-joining plaintiff precluded himself from future action. What right would the court have to cut him off from any portion of the time that the statute allowed him in which to prosecute his writ of error? But suppose the plaintiff in error waited until the last moment of the last day for his co-plaintiff to come in and join him. Would he not have evidence equivalent to his actual refusal, even more conclusive in the fact that his non-action was beyond possible doubt irrevocable? Now would this enable the active plaintiff to proceed without the other? No possible delay by any later appeal. No possible second hearing. What does it lack? The record shows it all. Nothing is wanting. We have authority that if there is joint judgment vs. two executors one

may proceed and the court will not presume the other to be alive. If extinguishment of right by death will cure, why not extinguishment by the statute of limitation? But in the case at bar Price was cut off the moment the court adjourned, having failed to take a bill of exceptions.

There are cases which declare this matter jurisdictional. A judgment of this court with the record showing this want of jurisdiction, would on that hypothesis, be void. Think of that.

Jurisdiction in error in England is said to depend on the writ of error, which is a writ issuing out of chancery authorizing the court of errors to proceed in *each separate case*, in the nature of a commission, under which only their authority to proceed arises. 2 Tidd 1134. Just as every original writ is the warrant of the court to try the case. 3. Bl. Com. 273.

Jurisdiction of the Supreme Court of the United States of writs of error, is vested in it by statute and does not depend upon the writ, though it issues in the name of the President of the United States. It only purports to direct the inferior court to send up the record to the court of errors, and does not purport to confer any authority on the court of errors.

A writ of error is neither in form nor substance a commission any more than a summons in debt or other cause of action is a commission to the court, though in England both were alike so regarded, both being by original writ.

Even in England the premise is mere fiction entitled to scant respect, and the deduction from it is at least questionable. The courts there have an established jurisdiction of classes of cases, and do not derive their right to try a class of cases from the commission (which the writ of error is asserted to be), but from the law. If the so-called commission issues in a case in which error does not lie, it would confer no authority and the court would disregard it. It is therefore not the source of jurisdiction over the case (which source is the common law),

but the process by which the parties are brought in and jurisdiction of the person is established.

But in the United States this is beyond question the case, and as the writ is neither in form nor substance a commission in each particular case, but merely a direction to the courts below to certify the proceedings, the jurisdiction of the case does not depend upon the writ. Only the jurisdiction of the person depends upon the writ, i. e., only the jurisdiction of the person is obtained by means of the writ; jurisdiction of the subject matter is conferred by the statute.

So the analogy between the cases as held in England and the case here, is a false analogy, and the court can see at once that the idea of the writ conferring jurisdiction of the case, as distinguished from personal jurisdiction of the parties, is manifestly erroneous.

If this view of the jurisdiction is correct, the court can waive its right to protection against a double hearing, when it is fully protected. The defendant can waive it by delay, or the court can refuse to insist upon it when it is cured.

Now, in an original suit, if a plaintiff joins one who has a *joint* interest, and the jointly interested party refuses to allow his name to be used, he may have summons and judgment of severance and be allowed to proceed alone.

The defect is therefore not a defect of jurisdiction to try the case, simply a want of power to bind the omitted party—not the party suing, but of the party failing to sue.

That it can proceed with the other party alone before it, proves that jurisdiction is complete with one party absent. But the jurisdiction of the person absent is not essential to the right of the court to proceed, but merely a matter of practice, like the rule that a party shall not split up a cause of action.

When one party having a right has a case, even though another has an interest with him, the court will not proceed

without the other. Does the court obtain the jurisdiction of the case by the refusal of the co-complainant to join? or by the statute conferring the power to try cases. When it dispenses with the presence of the co-plaintiff by saying you may sever, is the jurisdiction obtained by virtue of the authority which the act of the outgoing party confers, or does it merely relieve the jurisdiction it already had obtained of having to try the same matter twice? What new virtue, authority, warrant, control, is infused into the court by the act of the outgoing party? The rule is merely a rule of practice to protect the court from a double hearing—which concerns only the court and the parties before the court.

The jurisdiction of the person to be cut off and barred is obtained by the summons, and the want of the party is cured by the severance. Now if it is cured by the separation of the interests, or if the judgment of severance extinguishes the right, what more or other thing does it do than what the statute of limitations has done in this case? If the severance only severs and does not extinguish the right of the second plaintiff, then the statute bar does more—but the greater includes the less—if separation is enough, extinguishment is more than enough; but surplusage or supererogation cannot prejudice. In other words, how can a thing joint with two parts, remain joint when one part is extinguished? A joint right of action is severable by judgment; it no longer remains joint. How can it be joint when one part no longer exists?

The English cases make this distinction clear. Where one executor refused to join and was not joined in a suit, the court said they had no right to presume that he was alive, and held the suit well brought. In that case the right of one executor, if dead, survived to the other.

But when a joint right survives to the administrator or heir of the deceased, the death does not extinguish, or sever the

interest, or dispense with the need of joining the party who has the joint interest.

Here the interest which Price had in the controversy, if it had been joint, has been extinguished by the statute, not transferred.

Now, if the statute had provided an extension of time in any case, and that case had occurred, the right being saved to the heir (or other), of course that would be different, the the right not being extinguished but transferred, the severance would not take place.

A non-joinder of proper parties, in an original suit, must be taken advantage of by plea in abatement; because it is disfavored in law, it must be made before appearance and at the return term. The motion to dismiss was not made at the first term, and by analogy it ought to be barred. And this is especially so, as the injury by a dismissal then would have been harmless. We could have brought a new writ of error. But before the term at which this motion is made, the new writ is barred, and the injury beyond remedy. With an unquestionable right to a reversal, we are cut off without a decision on the errors in the record.

Every action of a court is supposed to have a purpose tending in some way to benefit the party who makes the motion, and to which he is entitled at the time he asks for it. If the time when it can operate to right a wrong to him has passed, he has lost his right to use it.

See Bradstreet v. Thomas, 12 Pet. 64.

Failure to proceed promptly waives objection. Tidd's Pr., p. 1162. Error taken before costs taxed and so premature, held cured by rule to assign errors. The defendant ought to have appeared to quash before. Citing 5 Barn. & Cres. 735, 1 Man. & Ryl. 170, 7 Barn. & Cres. 404, S. C.

Tidd's Pr. p. 1136. Where writ of error was against two executors, and only one appeared, and judgment affirmed for

both, second writ for this error, and held cured by the failure to object at proper time, and the court would not presume the other executor to be alive. 2 Str. 783.

The non-joinder of a person who ought to be made a plaintiff, in an action of tort, must be pleaded in abatement, though as to actions on contracts it is otherwise. 3 Ch. Pl. 452.

Observe that here is suggested a point that it is desirable to make prominent, and which the court is asked to keep in mind during examination of the decided cases. That the distinction between tort and contract as to parties is radical. The court is asked to observe that in no case founded on tort alone has the non-joinder been held fatal in the Supreme Court of the United States, so far as the reports disclose the nature of the action, except in the case of Hampton v. Rouse, and that case is put expressly on the ground of joint judgment and joint bill of exceptions, and no adverse or even several interest appears or is suggested.

Does the jurisdiction of the court, the right to try the case, depend upon the facts, or the time and manner in which the facts are brought before the court? If on the facts, it is matter of substance. If on the manner and time, it is form.

Here the fact exists that Price did not want to appeal—or could not. If that had appeared by summons and entry of record, it would have shown the fact at a particular time and in a special form. When this motion is made it appears in a form equally conclusive, that he has not applied within the time prescribed by law—the same fact in a different form. But in one case you are supposed to have jurisdiction, in the other, not.

The purpose is to prevent interminable delays and double hearings; both are prevented, but not in the special form or time.

Summary.

In conclusion, we claim now to have shown:

1. That though we might have joined Price with Ayres, that we were not bound to. Hanrick v. Patrick.

2. That it was not good practice to have done so. Paddock case.

3. That the court has jurisdiction when it has before it a complete cause of action, represented by a party who completely represents it. And that Ayres completely represents a cause of action entirely different from any cause arising from any exception that Price could have taken.

4. That as Ayres and Price could not declare jointly on adverse claims in an original action for an injury to the property, they cannot join in inconsistent assignments of error affecting the adverse and several titles.

5. That no reported case in the Supreme Court of the United States or in the circuit courts of appeal has held that parties situated as Price and Ayres are, ought to be joined in error.

6. That many cases have held that parties having a much closer connection need not join.

7. That mere identity of the thing in litigation is not enough to require the joinder of all the parties having claim to it.

8. That a party claiming the protection of a rule adopted to prevent a particular injury ought to claim that protection while it will protect; especially, when delay works irreparable injury.

9. That the only inconvenience suggested in the common law cases, is, delay of the plaintiff below of his execution by successive writs of error *during a limitation of twenty years.*

10. That in thirty-two cases reported in the Supreme Court, not one requires the joinder of parties in a case like this.

11. That in eleven cases out of this thirty-two, it is held that parties in much more intimate relation to each other than Price and Ayres, could have separate appeals or writs of error; and that the same may be said in seven to eleven of the eighteen cases from the circuit courts of appeal.

12. That in the only case reported from the United States Supreme Court in an action in its nature *ex delicto*, directly bearing upon this case, it was held as in Paddock's case, 6 Rep. 25, that the non-joinder was not cause of dismissal. Hanrick v. Patrick. Ante 11.

It results that the judgment of the Court of Appeals is erroneous and must be reversed. It remains to show the errors in the judgment of the circuit court, to which end we present

A BRIEF ON THE MERITS.

The assignments of error are set out in the Record at pp. 266 to 272, both inclusive.

The errors especially discussed and relied on for a reversal in this brief are these:

1

The court erred in giving a peremptory instruction for plaintiff below in these words: "The motion of the plaintiff to direct a verdict in his favor is granted."

Brief pp. 51 to 83.

2

The court erred in excluding from the jury testimony which tended to show that the concentric rings in trees, mentioned in the record, proved their age with accuracy.

Brief pp. 83–85.

3

The court erred in excluding testimony offered by plaintiff in error, which he claimed showed an estoppel on the defendants in error to set up title to the land here in controversy.

Brief pp. 85–89.

4

The court erred in not holding that the plaintiff in error made out a fee simple title to the land here in controversy.

Brief pp. 89–91.

5

The court erred in excluding from the jury the plat and survey offered by the plaintiff in error.

Brief p. 92.

6

The court erred in excluding from the jury the record of the circuit court of Mississippi county, Arkansas.

Brief pp. 92–93.

7

The court erred in excluding from the jury the deed from the Commissioner to John A. Lovewell, grantor of plaintiff in error. Brief p. 93.

8

The Court of Appeals erred in dismissing the case, and in failing to reverse for the reasons above assigned.

Plaintiff in error (called defendant hereafter in this brief), E. M. Ayres, alone, brought error to the Court of Appeals.

The defendants in error (called in this brief hereafter plaintiffs) claim rests solely upon this theory: That the land here in controversy is accretion to 5000 acres Polsdorfer bought from one Marley, and to 400 which he bought from Williams. p. 68.

These purchases lie in Lauderdale county, Tennessee, as shown by deeds to Polsdorfer, of date July 12, 1892. pp. 30–35.

To establish the right of Ayres to a reversal of the circuit court judgment, it is only requisite to show that there was evidence that ought to have been left to the jury to prove that the land in controversy was not accretion to Polsdorfer's land. This we prove by a weight of testimony that would have entitled us to a new trial if the jury on a proper charge had found against us.

In addition to this, we affirmatively prove that Flour Island existed from 1823, when it was surveyed as part of the territory of the United States; that it was granted by the United States; that it originally lay west of the main channel of the Mississippi, part of Arkansas; that the river suddenly shifted about 1839 or 1840 from the east, the Tennessee side, to the west, the Arkansas side, of the island, and that the whole body of the land is accretion to that island.

The deraignment of plaintiffs' title to the 5000 acres is from the State of Tennessee. pp. 13–32. The Williams' 400 acres is not deraigned from the State at all.

This, then, is the only claim of plaintiff for a recovery, that he owned two tracts of land in Lauderdale county, Tennessee, bordering on the Mississippi River—one of 5000 acres (the Woodfolk tract)—and the other of 400 acres (the Williams tract) and that the land here in controversy, from 3000 to 5000 acres (p. 67, 142, 184), is accretion to these two tracts of land—accretions to the Tennessee mainland.

The defenses in the case are fourfold—

1. The lands here in controversy are a part of, and accretions to, Flour Island*; being fractional sections 17, 18, 19 and 20, of township 12, range 12, east of the fifth meridian, which was surveyed and sectioned by the United States in 1823 as a part of the territory of Arkansas, consisting at that time of 256 acres, and that from that day to this the land here in controversy has constituted a part of the territory of Arkansas and of the State of Arkansas, and is not accretion to the Tennessee shore.

2. If Flour Island was entirely washed away, and was reformed as Tennessee soil—that is, as a Tennessee island—it, with all its accretions, belongs, not to the plaintiff, but to the State of Tennessee.

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* Flour Island, spelled also Flower Island in the record, was so called because two barges of flour sunk there years ago. p. 77.

3. The plaintiffs are estopped to set up title to the land here in controversy. The court erred in excluding the evidence of their estoppel.

4. Defendant E. M. Ayres shows a good title to the land in controversy.

I.

The first of these propositions—that is, that Flour Island—the land here in controversy—belongs to, and is a part of, the State of Arkansas, and is not accretion to the Tennessee shore—is thoroughly established by the proof in this cause. And this record does not furnish a scintilla of proof that there is any accretion whatever to the Woodfolk 5000 acre grant, under which Polsdorfer claims, nor to the Williams 400 acre tract; except the narrow strip between the Tennessee mainland and the center line of Old River as it is now, which Ayres has never claimed or touched.

The whole proof shows clearly that the old Tennessee main shore called for in the Woodfolk grant is clean cut—a sheer and perpendicular bank—from eight to fifteen feet high, against which the current of the Mississippi River has always washed, while its channel was there, and in high water since then, leaving a body of water just at its base all the way along its front, where it now constitutes Old River and lakes and bayous. And the fact that the land in controversy is accretion to that original 256 acres surveyed and sectioned when the territory of Arkansas was surveyed and sectioned in 1823, and that it has had a continuous existence as originally existing or as enlarged by accretion, is as thoroughly demonstrated in this record as any fact *in pais* can possibly be.

We come now to the proof in this record on this proposition, premising that much of the testimony requires to be read with the fact in view, that the witnesses seem to have somehow had in mind the idea that the controversy turned upon the question whether there remained any part of the original

256 acres; and they speak of the whole island being washed away in the same breath and at the same time that they are fishing on its banks or hunting ducks with their feet upon it. Keeping this in view, there is hardly any discrepancy in the testimony.

1. Charles Bowen, 85 years of age, page 191, has lived in Mississippi county, Arkansas, for seventy years, and has known Flour Island before Arkansas was admitted into the Union. In fact ever since 1832. That after Arkansas was admitted into the Union in 1839 or 1840 the channel of the Mississippi river, which before that time was on the east or Tennessee side of Flour Island, changed to the west or Arkansas side of Flour Island. p. 191. That when he first knew this island it was surveyed by the General Government, and sectioned as Arkansas land, and attached to Mississippi county, Arkansas, as fractional sections 17, 18, 19 and 20, township 12 N. R. 12 east of the 5th principal meridian. That his brother was sheriff and tax collector of Mississippi county, Arkansas, from 1837 to 1845. That the witness was sheriff and collector for sixteen years, beginning about 1845. And that he was a deputy under his brother for five years preceding his election. That he assessed and collected taxes on Flour Island, sections 17, 18, 19 and 20; he does not know exactly, but it was along in 1844–5 and 6; that he remembered the name of Barnes, but the other fellow who paid the taxes to him on this land, he doesn't recollect. That the last time he saw the island was in 1861. That at that time there were four or five hundred acres on the island, high and heavily timbered land, and that at that time in the old channel of the Mississippi River, lying between Flour Island and the Tennessee shore, there was water nearly all the way round the island. p. 192. That in 1861 he was a Confederate soldier at Fort Pillow, and that he crossed over from Fort Pillow to the island on an old boat, which was used as a bridge to

the drill ground situated on the island. That in 1832 there were two islands in existence, one known as Island 32 and the other as Island 33, which latter is Flour Island. That the channel changed in 1839 or 1840, it struck the head of Island 32 harder than it did 33, and threw the channel through the chute between the two islands, sweeping away 32 which was west of 33, and leaving the channel on the west side of 33. p. 193. And that the taxes he collected from Barnes were taxes on Barnes' land on 33, which is the island in the present controversy. p. 194.

As further evidence that the land in controversy, fractional secs. 17, 18, 19 and 20, belong to the State of Arkansas, the defendant introduced and read from a book from the office of the clerk of Mississippi county, Arkansas, showing that fractional sections 17 and 18 were entered by D. Hardiman in the year 1836; and that fractional sections 19 and 20 were entered by J. C. Barnes in 1846. A plat book of Mississippi county, Arkansas, was also introduced which showed the relative position of Craighead Point, which is in Arkansas, and Flour Island. p. 232.

The patent from the United States Government to D. Hardiman, on the 1st day of February, 1843, shows the land here in controversy, or "fractional sections 17 and 18 (on island) in township 12 range 12 east, in the district of land subject to sale at Helena, Arkansas, containing 158 acres and one hundredth of an acre, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, which said tract had been purchased by the said D. Hardiman," certified from the Interior Department at Washington, and shows that it is Arkansas land. p. 230. And "fractional sections 19 and 20 (on island) * * * containing 99 acres and seventy-hundredths of an acre * * * purchased by John C. Barnes," shows that that was a part of Arkansas when he purchased. p. 231–232.

The map and survey from the United States land office show the position of that island, where these fractional sections 17, 18, 19 and 20, lay at the time of these transactions (p. 232); all showing that at that time, and from 1823 up to that time, Flour Island was recognized as belonging to Arkansas, and was so treated by the United States Government, by Arkansas, and by all persons.

2. E. C. Cooper, 66 years old, resides in Lauderdale county, Tennessee, and has known Flour Island since 1854. From 1854 to 1862 there were 1000 acres of the original island, and a good big farm on it. p. 182. The timber on it at that time varied from twenty inches to three feet in diameter. The land on the island sloped toward the Tennessee shore, it being much higher on the southwest side—the Arkansas side—than on the northeast side—the Tennessee side. The timber was much smaller when you got off the main body of the island. There were some fifty or sixty acres of cleared land in 1862. p. 183. That on the 25th of December, 1898, there were "three or four acres of that original island" across the top of the backbone. This backbone of the original island is right at the foot of Crutcher Lake. From 1854 to 1862 there were pools of water and lakes between the island and the Tennessee shore at the banks of the Tennessee side. The deep water was at the Tennessee bank. And some of these pools and lakes hold water the whole year. In 1854 Old River ran along the original Tennessee shore, and it was then 400 yards wide, and extended around and up to the Friend place. It was three-fourths of a mile wide in some places and a mile wide in other places. p. 251. The Tennessee banks are generally perpendicular now. Witness would guess there were 4000 or 5000 acres of the island now. p. 184. "To the island, as I knew it in 1854, there have been large accretions." Witness, pointing to the backbone, said the land made in every direction from this backbone, all around it. And it formed from

the island toward the Tennessee shore. There "was no formation out toward the island from the Tennessee shore. Oh, no, there is none to this day." The backbone is higher than the other part of the island, and as he saw it in 1898 it existed in 1854. p. 185. It is about four miles from the head of Flour Island, going down the old channel of the Mississippi, to where it empties into the main river. In the old channel it is mostly willows. At the upper end mostly mulberry and box elder. The willow growth, from the size of a riding switch up to fifteen inches in diameter, extends from the mouth of Old River three or four miles and next to the Tennessee shore—between the Tennessee shore and Flour Island. At the extreme upper end there are cottonwood trees, I suppose, two feet in diameter, and from that on down. p. 186. In 1854 witness had a contract with Barnes to cut cordwood on the island. The wood was mostly cottonwood, which was about three feet in diameter. Going from the Polsdorfer house (this is really the Fortner house, built by defendant Ayres, 1892, p. 215–216) toward the mainland, on the Tennessee shore, the land seems to be about the same height until you get within about 600 or 700 yards of the Tennessee shore, when it slopes and makes a depression along at the Tennessee shore, where there are pools and ponds of water. p. 187. Witness was on the island in 1867, and the backbone was considerably higher than any of the other land around it, because there was an overflow at the time, and this was the only land out of the water. p. 188.

3. William Hip, 71 years old. Lived on Flour Island from 1856 to 1862.* There were 150 acres of old timber land and from forty to fifty acres of cleared land, five houses, one double and four single houses, on the island in 1856. The cleared land, should say, had been cleared thirty-five or forty years.

* The statement of this witness that he left the island in 1862 (p. 233) is an evident mistake, as witness Laurence stayed in the Hip house in 1864, and the witness Driver stayed all night with William Hip in the latter part of 1864 or early part of 1865. p. 196.

Including the 150 acres above spoken of, there were 1900 acres of Flour Island in 1856. The accretion was to the island and not to the Tennessee shore. Water stood in places between the Tennessee shore and the island; and the Tennessee shore stood above the Old River bed in some places from four to six feet, and in others from ten to twelve. There was a slant in the lay of land from the old island in the direction of the Tennessee shore. There were stumps on the cleared land from three to three and a half feet in diameter. pp. 233–4–5. The timber on the accretion, or newly formed land, was smaller than the timber on the old original Flour Island. The largest on the accreted land being about two feet in diameter, from that to little timber; getting smaller as you went from the original Flour Island toward the Tennessee shore. At or near the banks of the Tennessee shore, opposite Flour Island, the willow brush was so thick you could hardly pull through it with a skiff. In other places there are ponds and no growth. A part of the original island, as it existed in 1856, was there four years ago. There was a very notable place to me, where we swam cattle off, in 1858, out to the bluff (on the main shore). It was a high place in the island, with large timber on it, and was the place from which we shipped our cattle during high water. Witness doesn't think there was more than half an acre of it when he saw it three or four years ago. p. 236.

4. J. E. Fields, a witness for the *plaintiff*, went on the island in 1847—stayed 1848 and 1849. Kept a woodyard there. p. 86. In 1849 witness estimates there were 1000 acres of the island still there. A man by the name of J. C. Barnes owned it then. At that time the Old River ran all around the island between it and the Tennessee shore, and it was a mile across the water from the island to the Tennessee shore in 1849. pp. 86–87.

5. David H. Laurence has known Flour Island since 1864. At that time lived just across the island on Arkansas shore, on Craighead Point. Worked for a man by the name of Gardner, putting wood on the bank of the river, staying a portion of the time at the Hip house, which, from its appearance at that time, was from fifteen to twenty years old. p. 156. The timber cut in 1864 measured from eighteen to twenty inches in diameter. At that time Flour Island was a big place. The last time I was there it was caving on the Mississippi bank. Now that part of the river forms Crutcher Lake; and on the bank of Crutcher Lake is the backbone. p. 157. The timber gets smaller from the Hip house toward the Tennessee shore. And the land also gets lower near the Tennessee shore. In 1894 defendant Ayres took me with him to cut a tree on the island, which we cut, a half or three quarters of a mile toward the Tennessee shore from the backbone. We counted the rings on that tree and there were over fifty rings, I think fifty-five. p. 158.

6. Alexander Baker, examined by both parties, says that the island where Uriah Hip* lived in 1854 washed away. But he says that the made land was made to the island he supposes (p. 87), and he says that there was a backbone which never did wash away (p. 90); and that he has known it since 1854. There was a right smart farm on the island in 1854, and it was said that a man by the name of Barnes used to own it. There was a small farm on it in 1863–4. p. 93. The land slopes when you come near to the Old River, and in the Old River there is nothing but willows, and the timber runs smaller as you approach Old River. The backbone ridge is right at the foot of Crutcher Lake. p. 94–5. This backbone was there

*The Hip house and Hip place referred to by this witness was three miles below Crutcher Lake and the backbone as you go toward Fort Pillow, and was situated on the Mississippi River side of the island (p. 94), and is quite different from the Hip house that the last witness (Laurence) lived in, in 1864, and the witness Driver stayed all night with William Hip in, in 1864 or 1865.

in 1863. Witness was a magistrate in Lauderdale county, Tennessee, along about 1872, and has resided in that county for 62 years. Along in 1872 to 1875 he assessed the Joe Marley or Woodfolk 5000 acres, but never did assess Flour Island. Witness recollects one case in 1854 where a man ran from the officer, and the officer did not get him, saying that he had fled to Flour Island, and that was in Arkansas, and that was the reason why he did not go for him. p. 98.

7. Jacob Cox, aged 68, residence Osceola, Ark., business, steamboat pilot. Has known Flour Island since 1840. p. 200. At that time the channel of the Mississippi River ran to the right (west of Flower Island). He understood it had changed a short time before.

The original Flower Island did not all wash away. There were about 300 acres of it never were moved or washed. To this land there was accreted on all sides new land. p. 201.

8. T. A. Matthews, residence Osceola, Arkansas, and is a deputy clerk of Mississippi county, Arkansas. p. 201. Is acquainted with Flour Island, the same is claimed as a part of Mississippi county, Arkansas; "it is described on the records of said county by survey numbers as all of section 17, all of section 18, all of section 19, and all of section 20, in township 12 north and range 12 east." And witness files as a part of his deposition a plat of the township. He further swears that taxes are paid on Flour Island as a part of Mississippi county, Arkansas. p. 202.

9. W. B. Fortner lives in Mississippi county, Arkansas, and has known Flour Island for fifteen years; lived on it for eighteen months. p. 206. When he moved on the island some four years ago (deposition taken in 1895 in another cause) there were two houses on the part of the island he moved to, and ten acres of cleared land. The houses belonged to E. M. Ayres. At that time there were about 3000 acres of the island. Witness cut cottonwood on the old part of the

island four and a half feet in diameter, sycamores from two to three feet in diameter, and mulberry from eighteen to twenty inches in diameter. p. 207. From Coal Creek up Tennessee bank for a mile up Old River opposite this land was from three to five feet higher than the old channel of the Mississippi River. Then set in a solid lake of water running up the bank one-quarter of a mile next to the Tennessee shore, the water being from five to ten feet deep, according to the season of the year. From the upper end of this lake a bayou sets in, and the banks along the Tennessee shore are from three to ten feet high. Witness cultivated the land, and in so doing plowed up old brickbats, old iron and old shovel plows. This was the same spot that he was informed by old citizens was formerly occupied by old man Hip. The newly made or accretion lands formed on the island, and went out toward the Tennessee shore, and did not form on the Tennessee shore and out toward the island; as the Tennessee banks were bluff, ranging from three feet in the lowest to forty or fifty feet in the highest place above the bed of the old channel of the Mississippi River. And the old channel of the Mississippi River is today plainly marked. p. 208.

10. E. M. Ayres, defendant; lives in Osceola, Arkansas. Bought Flour Island from J. A. Lovewell and paid for it. p. 211. About Crutcher Lake the timber measures eight, nine, ten and thirteen feet in circumference. Right at the head of the backbone, which is on the Tennessee side of Crutcher Lake, last Sunday I made measurement of the timber above spoken of. Last June, Judge Heiskell and myself and a negro by the name of Bell measured a tree standing on this backbone on the bank of Crutcher Lake, and it measured sixteen feet nine inches in circumference. p. 216. Water lies in Old River against the Tennessee bank in front of the 5000 acre tract in pools all the year round—either a continuous river or pools of water. p. 218. In 1894, about three quarters of a

mile from the Fortner house (which house I had built in 1891 or 1892 (p. 214), I cut a tree on the island which measured 42 inches in diameter and had 56 rings; in other words the tree was 56 years old. This tree was not as large as the one measured by Judge Heiskell and myself. p. 219.

11. James D. Driver, aged 69, resident of Osceola, Arkansas; has known Flour Island since 1859. When he first became acquainted with it there was a double frame house on it, and some other small buildings, three or four acres seemingly higher than the rest of the island, forty acres of cleared land, owned as he understood by old man Hip, who was also the owner of the witness William Hipp, with whom this witness stayed all night on the island in the latter part of 1864, or in the early part of 1865, and there seemed to be the same amount of cleared land on the island as when he knew it in 1859. pp. 195, 196. There were large accretions to the island in 1865, and the newly made land was attached to the original island, the timber growing smaller from the island toward the Tennessee shore, and the banks at the Tennessee shore being from six to ten feet higher than the old bed of the river, in some places being nearly perpendicular, and none of the new formed land being on a level with the Tennessee bank. p. 197. Part of the accretions had in 1865 extended to the Tennessee shore; and near the Tennessee shore in places there were ponds of water between it and the Tennessee shore, and no timber there, as it was mostly water. p. 198.

Here then are eleven living witnesses who swear that Flour Island, some part of it as it existed in 1823, still remains, and that the present island—the land here in controversy, is this original Flour Island and accretions thereto. Not only do the living witnesses swear to this, but the physical facts show the same thing. The lay of the land on the island, sloping toward the Tennessee shore from the backbone, the bluff banks at the original Tennessee shore, the Old River lying up against the

original Tennessee shore, the size of the timber, beginning with willow brush at Old River at the Tennessee shore and getting larger toward what the witnesses call the backbone of the island, where a tree is found sixteen feet nine inches in diameter, demonstrate beyond a peradventure that Flour Island as it now exists, is the old 1823 Flour Island with the accretions to the island, and alone to the island.

Eleven living witnesses speak *et res ipsa loquitur;* in fact *res ipsæ loquantur.*

Upon these facts, shown clearly in this record, the trial judge granted the plaintiff's motion, and gave a peremptory charge in his favor (p. 255), asserting thereby that all this was no evidence to be left to the jury. We assign this as error. p. 266.

II.

But in the second place we insist that if Flour Island was entirely washed away, which is the contention of the plaintiff, and if it was reformed as a part of the State of Tennessee—that is, on the Tennessee side of the Mississippi river—it, with its accretions, belongs, not to the plaintiff, but to the State of Tennessee.

The principal witness for the plaintiff as to the material question of fact in this case is Captain Marsh Miller, and we submit that his testimony is conclusive that the plaintiff has no title to the land here in controversy. On page 72, in answer to the second question on that page, he says: "In 1839, 1840–1–2–3–4, in my opinion, the big rise of 1844 changed the river from the Tennessee side of Flour Island, and it went up and above the head of Island 33 (Flour Island), and went down into the chute of Coal Creek, and made a little bit of narrow concern, and changed from the Tennessee shore to the Arkansas side, and went down that way, and continued that way in 1846."

In the next answer, which is hardly intelligible in itself, he says: "The river went down between these two towheads and between Craighead (Point), and lying between Flour Island, and went down that way, and the channel went down next to the head of that and washed that way, and continued washing until 1850, and was all washed away then." He says further: "The channel was on the Tennessee side of Flour Island in 1839." pp. 72–73.

To make this intelligible it is necessary to state that Craighead Point is on the Arkansas side of the river; and the statement is clear to this extent, that the river, which in 1839 was on the Tennessee side of Flour Island, after the big rise of 1844, was on the Arkansas side of Flour Island, and between Craighead Point and Flour Island, and that the island was all washed away by 1850.

This thoroughly establishes the fact that the channel—the boating channel of the Mississippi river—changed in one season from the northeast or Tennessee side of Flour Island to the southwest or Arkansas side of the island.

In 1839 the island was unquestionably a part of Arkansas. The change of the channel left it Arkansas land. On the point of the change of the channel, the testimony of the steamboat captain on a matter of which it was his business to be informed, is entitled to much weight. According to his testimony the island in 1839 was intact, but he says by 1850 it was washed away. On this point his testimony is not to have any factitious weight. When the river left the island a half mile to the left, it no longer concerned the navigation of a boat, and was no longer a professional question. With other witnesses it was a professional, official or proprietary question, and that testimony is entitled to the highest credit.

Captain Miller must mean that the original island—the land on the spot that constituted the island in 1839, as distinguished from its increment by alluvial deposit—was all washed

away. And while we think this record demonstrates that he is mistaken in this, yet in fact if he is not, in that view it would be immaterial. If he means that the island and all its accretions were swept away, so that no part of either was left in 1850 between the Arkansas shore at Craighead Point and the Tennessee mainland, where the high bank defines the boundary of the plaintiff's grant at its date in 1837 (p. 14), then the proof on the other side is overwhelming that the fact is otherwise. For, as we have already shown, the trees on the island absolutely negative its having been all washed away within the last sixty years. Taxes were being collected on the island from 1836 up to 1860. There was a large farm on the island in 1854—four years after Miller says it all disappeared—with stumps on the farm three and a half feet in diameter, and large timber besides. J. C. Barnes obtained a U. S. patent for the land in fractional sections 19 and 20 on the island in 1847 (printed in Rec. 1857), he having entered it in 1846 (p. 232); and D. Hardiman, on February 1, 1843, obtained a patent from the United States "to fractional sections 17 and 18 on the island" (p. 230), he having entered it in 1836 (p. 232).

Another steamboat captain, Drouillard (p. 120) knew Flour Island in 1842 or 1843, and thinks it disappeared in 1843 or 1844. "The channel caving from east to west, cut it away and caved it away." And this at the very time when Hardiman entered his part of it, and he and Barnes went along paying taxes on it to the State of Arkansas.

One other witness, and only one other, John P. Laney (p. 119), said he had known the island fifty years ago, and that it began to wash away a short time previous to 1860, and finally disappeared in 1863 or 1864. And that he knows the facts by hunting and chopping wood on the island. p. 119. At this very time—1863–4—Laurence was on the island haul-

ing wood for Gardner, Driver was staying all night with Hip in 1864 or 1865, on the island, and in 1862 Cooper and Hip say that there were a thousand acres or more of the island, and a considerable amount of cleared land on it.

So that this theory of the disappearance of the island is so effectively exploded that it cannot be entertained for one moment.

But we insist that if it did disappear, it reappeared and whether it reappeared on the Arkansas side or the Tennessee side of the Mississippi River, and even if after the reappearance the accretions extended it to the Tennessee shore, in the one case it would belong to the State of Arkansas, and in the other to the State of Tennessee. Certainly in neither could it by any possibility belong to the Tennessee shore owner by virtue of his riparian proprietorship.

Yet the trial court held that there was no evidence and no legitimate deduction from any evidence upon this record, as stated to your Honors, against the view that this land was accretion to the Tennessee shore.

The only evidence, as we read from the record, to the point that the land here in controversy is accretion to the Tennessee shore, to the Polsdorfer 5000 acres and the Williams 400 acres, is as follows:

Marsh Miller (p. 73) says: "When the island was washing so, a mud bar commenced making on the Tennessee shore (p. 74). He says the formation commenced at the Fortner house on the Tennessee shore; and the island was above the house. That the formation kept on increasing on the Tennessee shore as the island gave way. And that was the foundation of all that accretion. He says there was a little of this formation there in 1839, and a woodyard in that vicinity."

In cross-examination (p. 76) witness shows very clearly that the house which he calls the Fortner house was not that house at all, but a little one-room cabin on the original Tennessee

shore. At page 80 witness admits that as a general rule accretions to the shore slope toward the water's edge, and that the timber grows where the land forms.

This is all of the testimony on this point, unless the testimony of Capt. Drouillard (pp. 121–122, ans. 20, X-ans. 10) is to be construed as saying that the land was made to the Tennessee shore, instead of on the Tennessee side of the island. As we read the question and answer on p. 122 it simply is, that the island reappeared on the Tennessee side of the river. And that the accretions were on the Tennessee side instead of on the Arkansas side of the river.

It is uncertain, to say the least of it, what the witness means by "on the Tennessee side." But if it should be construed to mean that the accretion was to the Tennessee mainland, then it would be these two witnesses, without any sustaining circumstance or physical fact, against eleven witnesses with the facts, we have already recounted.

This testimony that the accretion was to the Tennessee shore is so overwhelmingly confuted by the witnesses that have been referred to heretofore, and the physical facts that have been arrayed before your Honors, that we do not think the question is a debatable one.

And yet this is the record upon which the trial judge peremptorily instructed for the plaintiff.

We submit that this was error.

In Schuchardt v. Allen, 1 Wall. 359–369, the court, through Mr. Justice Swayne, say: "A peremptory instruction is equivalent to a demurrer to the evidence. And such an instruction ought to be given whenever the evidence is not legally sufficient to serve as a foundation for a verdict. * * * "A demurrer to evidence admits not only the facts stated therein but also every conclusion which a jury might fairly or reasonably infer therefrom."

See also, Pleasant v. Fant, 22 Wall. 116.

In Ins. Co. v. Doster, 106 U. S. 30–32, the court say, through Mr. Justice Harlan, "where a cause fairly depends upon the effect or weight of testimony, * * * it should never be withdrawn from the jury, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it."

In R. R. v. Cox, 145 U. S. 593–606, Fuller, C. J., speaking for the court, said, "the case should not have been withdrawn from the jury, unless the conclusion followed, as a matter of law, that a recovery could not be had upon any view which could properly be taken from the facts the evidence tended to establish."

In Mt. Adams, &c., v. Lowery, 74 Fed. Rep. 470, Mr. Justice Lurton, speaking for the court, said: "Neither is it a proper standard to settle for a peremptory instruction, that the court after weighing the evidence in the case, would, upon a motion for a new trial, set aside the verdict. The court may, and often should, set aside a verdict, when clearly against the weight of evidence, where it would not be justified in directing a verdict." Citing Burton v. Thompson, 2 Burrow 664; 2 Salk. 646. And at page 476 the learned justice sums up the cases thus: "Both upon reason and authority there is a difference between the legal discretion of the court to set aside a verdict against the weight of evidence, and that obligation which the court has, to withdraw a case from the jury, or direct a verdict for insufficiency of evidence. In the latter case it must be so insufficient in fact, as to be insufficient in law; in the former case it is merely in fact, and it may be insufficient in law, or may have more weight and not enough to justify the court in exercising the control, which the law gives it, to prevent unjust verdicts, to allow verdicts to stand. * * * We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court on

weighing the evidence would upon motion, grant a new hearing. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions he is necessarily required to weigh the evidence that he may determine whether the verdict was one which might reasonably have been reached. But in passing upon a motion to direct a verdict, his functions are altogether different; in the latter case we think he cannot properly undertake to weigh evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party. * * * It is certainly not his function to weigh the evidence for the purpose of saying how the verdict should go."

In Travelers Ins. Co. v. Randolph, 78 Fed. 764, Mr. Justice Harlan reviews this case and thoroughly concurs with it, saying "a peremptory instruction should not be given to the jury, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking such instructions; and a case cannot properly be withdrawn from the jury, because in the judgment of the court there is a preponderance of evidence in favor of the party asking the instruction."

A judge should not weigh or balance conflicting evidence, however strongly evidence on one side may in his judgment preponderate; that question is for the jury.

See also Lang v. Suter, 81 Ill. App. 192.

It is also well settled that where the evidence tends to contradictory conclusions though no conflict among the witnesses, a verdict should not be directed.

Mitchell v. McLaven, 51 S. W. 269.

See also—

92 Fed. 553. 93 Fed. 899. 78 N. W. 1084.

Under these authorities we insist that a reversal is inevitable in this cause.

And not only does this evidence show that a reversal ought to be had in this case, but from it, it is perfectly plain :

1. That Flour Island belongs to the State of Arkansas and has been a part thereof since 1823.

2. That it has never entirely disappeared.

3. That the accretions here claimed by the plaintiff were accretions to Flour Island and not to the Tennessee shore.

4. That if Flour Island entirely disappeared, it certainly reappeared as an island and not as accretion to the Tennessee shore.

And the grant from the State of Tennessee to the plaintiff's grantors could not, in the nature of things, cover the land here in controversy.

This proposition is stated by Mr. Gould on Water Courses (sec. 166 and cases in n.2): "In general, if an island growing out of the water has a fixed channel which separates it from the adjacent land, the owner of such land cannot claim the island as belonging to it by accretion.

In St. Louis, etc., v. Ramsey, 53 Ark. 314, the court says: "A gravel bar in the bed of a navigable river, * * * which is distinguishable from the bank by the absence of soil and vegetation, is not alluvion added to the land of the riparian owner, but belongs to the State."

In Cox v. Arnold, 31 S. W. 592 (Mo.), it appeared that "a portion of the fractional section bordering on a navigable stream was washed away by the current;" and that an accretion formed from an island in the river, and extended within the bounds of the section, but did not connect with the new shore line." The court held that the owner of the section had no title to any part of the accretion.

In Filmore v. Jennings, 78 Cal. 634, it is said: "The owner of an island, between two channels of a river, which, by a change in the course of a channel, has gradually pushed up stream as a result of natural accretion so as to cover the whole front of a riparian owner, * * * where the channel between the island and the mainland has become non-navigable except at high tide, is entitled to the accretion."

In the City of Victoria v. Scott, 29 S. W. 681, it is distinctly held that where the accretion is to the island, though it may gradually extend toward and finally reach the shore, it does not become the property of the shore owner, but is the property of the island owner.

See also—

Cooley v. Golden, 23 S. W. 100.

Hahn v. Dawson, 36 S. W. 233.

Benson v. Morrow, 61 Mo. 347.

Perkins v. Adams, 33 S. W. 778, was an action for land claimed as accretion to fractional section 10, lying in Holt county, Missouri. The evidence showed that in 1866 an island formed in the Missouri river, opposite said section 10, extending up and down the river. It first appeared as a sand bar. It increased from year to year. Willows and cottonwood of considerable size grew on it. Steamboats passed up and down the river on both sides of it. Finally the waters of the river withdrew entirely to the west or Nebraska side of the river, leaving a deep, wide slough between the island and the Missouri bank. Plaintiff claimed the land to the middle of the slough as accretion to his land. The defendant claimed that the land in suit was not accretion to the plaintiff's land, but an island or sandbar in the river.

In reversing the judgment for the plaintiff, the court said, *inter alia*, the trial court "erred in holding that the shore owner was entitled to the land formed in his front, whether formed by gradual accretions to the shore, or reliction formed

by the gradual receding of the river, or by the river depositing sand and earth on its bed as a bar or island and afterward connecting with the shore by the receding of the intervening river; and also erred in holding that the defendant was entitled to the island, only if formed on the west side of the center line of the main channel. The owner of lands on the bank of the Missouri river is not the owner of an island which springs up in the midst of the river, whether the island be on one side or the other of the thread of the main channel."

This case also holds that if one is entitled to accretions, he is entitled to them even though they *extend beyond what was once the middle thread of the river.*

In Hahn v. Dawson, 36 S. W. 235, the court says the instructions asked, towit: "If the land in controversy was originally formed in the Missouri river as an island, or sand bar, with a channel between it and the mainland, belonging to the plaintiff, and that by accretions to said bar or island it finally extended to the plaintiff's land, or if by the recession of the river from this intervening channel after the formation of the bar or island, the bar and the mainland became connected, it belonged to the plaintiff, was clearly erroneous, because it ignored the fundamental idea upon which titles by accretions is based, namely, that they must be imperceptible or gradual accretions to the plaintiff's land, or the gradual receding of the river therefrom. If the accretions were to the island on the south side, and by a change of the river they were thus brought together, such union of the two tracts did not make the island accretion to the mainland."

See also—

Reese v. McDaniel, 115 Mo. 145.

Cooley v. Golden, 117 Mo. 33.

Bennett v. National, etc., Co., 72 N. W. 507.

But not only is the trial judge in error but he gives erroneous reasons for his error.

At page 258 he says, "There is not a particle of evidence in this case of any avulsion, and, therefore, the increment belongs to Polsdorfer as riparian owner." *Non constat. Non constat* that if there is no avulsion, it follows that this is accretion to the shore owner's land. Of course there is no avulsion. A change of the course of the river from one side of the island to the other, not being an avulsion. If, however, that is avulsion, the statement is confuted by the whole record. The statement that there is not a particle of evidence in this case that there is any avulsion may be perfectly true, and yet the consequence that the trial judge says flows from this, cannot be true in face of the swearing of eleven witnesses and a state of physical facts that cannot be gainsaid, and is not attempted to be denied in this record.

In other words, instead of the fact being as stated by the learned trial judge, that as there is no avulsion (in the sense in which the court used the word) proven in this case, therefore the accretion is accretion to the shore owner, the fact is that it is accretion, but not accretion to the shore owner's land, but accretion to the island owner's land, and to the island owner's land alone.

If there is any truth in human testimony, if there is any reliance to be placed upon the laws of nature, this record demonstrates that fact absolutely and conclusively.

The only witnesses that plaintiff introduces on this point, towit, Miller and possibly Drouillard, in their testimony make out a change of the boat channel of the river, from one to the other side of the island. They both show by their testimony that there was a change in the navigable channel of the Mississippi River from the Tennessee to the Arkansas side of this island somewhere about 1840. That change was so complete, in one rise of the river according to their testimony, that no boat could run on the Tennessee side of this island from that time on; and that the land filled in between the

island and the Tennessee shore in consequence of that change.

But in fact this was not an avulsion nor a sudden reliction.

An avulsion is in the nature of a landslide. Or as some of the authorities seem to hold, a sudden cutting off of a part of one man's land and attaching it to another by the sudden change in the course of a river.

It is "a tearing loose (*avello*), a tearing away" —as in horticulture, a limb from a tree.—Plin. 17, 10, 9.

Eubœa avulsa Bœotiæ.—Plin. 4, 12, 21.

Justinian Institute, Lib. 2, Tit. 1, sec. 21, says: "It is where the violence of a river bears away a portion of your land and unites it to that of your neighbor"—(*et vicini prædio attulerit*). And he says: "The land undoubtedly still continues yours"—(*palam est eam tuam permanere*).

"It is the removal of a considerable quantity of soil from the land of one man, and its deposit on, or annexation to, the land of another, suddenly and by the perceptible action of the water." 2 Wash. Real Property 452.

In such case the property belongs to the first owner.

Bracton 221.

Reliction* (*reliquo*) is an increase of land by the retreat of

* It may not be uninteresting to give here Sir Matthew Hale's definition or description of alluvion, reliction, and islands:

In his De Jure Maris et Brachiorum ejusdem, Ch. 4, he says: "The King has title to all *maritima incrementa*—(1) *per projectionem vel alluvionem*; (2) *per relictionem vel desertionem*; (3) *per insulæ productionem.*

"1. Increase *per alluvionem* is where the sea, by casting up sand and earth, doth by degrees increase the land and shut itself out further than the ancient bounds went. The reason why this belongs to the Crown is, because where there is now dry land was formerly part of the very *fundus maris*, and consequently belonged to the King. But indeed, if such alluvion be so insensible that it cannot be by any means found that the sea was there, *idem est non esse et non apparere*, the lands thus increased belong, as a perquisite, to the owner of the lands adjacent.

"2. Increase *per relictionem*, or recess of the sea. This doth, *de jure communi*, belong to the king; for, as the sea is parcel of the waste or demesne, so of necessity is the land that lies under it, and therefore it belongs to the King, when left by the sea.

"3. Increase by islands arising *de novo* in the King's seas, or the King's arms thereof." (Strange to say, none of these authors refer to this as the *circumluvio* of Cicero. *Jura alluvionum et circumluvionum.*—Cic. de Oratore 1, 38, 173.) "These, upon the same account and reason, *prima facie*, and of common right,

the sea or river. If sudden and sensible, the land belongs to the State; if insensible, to the adjacent owner.

Woolrych Water Courses 29–36.

9 Conn. 41. Vin. Abr. 574.

1 Hawks N. C. 56. 1 Gill & J. 249.

The change of the boat current of a river from one side of an island to the other is neither.

And while we say it is true that this is not a case of avulsion, we insisted before the trial judge and insist here, that if it is avulsion or sudden reliction, the land here in controversy would not belong to the shore owner but to the State. But should it be concluded from the plaintiff's testimony, leaving aside all the defendant's testimony, that this was a case of reliction—the recession of the water, whereby the bottom is left bare—in such case, if the reliction is gradual, the rule of alluvion applies; and in this event the alluvion would be to the island on this whole record and not to the shore owner. But if the reliction is sudden the relicted land would belong not to Polsdorfer but to the State of Tennessee.

Boorman v. Sunnuchs, 42 Wis. 245–246.

2 Blackstone's Com. 262. 23 Wallace 67.

In the Wisconsin case, after laying down the rules as above stated, the court say: "The plaintiff should have given the court more definite information in the progress of the falling or recession of the water. He should have shown the several stages of the process during longer or shorter periods of time as determined by the width of the strip uncovered, or by comparison with the bank, or other known and fixed objects, to the end that the court might have some more definite and satisfactory data upon which to determine the character of

belong to the king; for they are a part of the soil of the sea that belonged before in point of propriety to the King; for when islands *de novo* arise, it is by the recess or sinking of the water, or else by the exaggeration of sand or slubb, which in process of time grows from land environed with water."

See 6 Cow. 541–543.

the reliction." That is, the burden is on plaintiffs to show that the reliction, if reliction there is, was of that character that it plainly belonged to them.

And in the 23 Wallace case (St. Clair Co. v. Lovingston) the court say, "But if the alluvion be sudden or considerable it belongs to the State."

So that, if in this case the fact which the plaintiff's testimony might be construed as tending to show, to-wit, that the lands here in controversy were produced by avulsion or by sudden reliction, or as the supreme judicatory of the country says, if they are alluvion and are considerable (and the evidence here shows they are from 3000 to 5000 acres, pp. 68, 142, 184), in all of these events, if the land was within the State of Tennessee it would belong to the State, and in not one of them, by any possibility, could it belong to the shore owner or the plaintiff in this case.

So that if this is a case of avulsion the plaintiff can not recover. If it is a case of sudden reliction the plaintiff can not recover. And if it is a case of alluvion the plaintiff can not recover. Because in the two former cases the authorities are all one way, that the property would be the property of the State. And in the latter case the evidence demonstrates that alluvion—the accretion—was all to the island, and not to the shore owner's land.

But the learned trial judge continues, "from the day of Bracton, who got it from the Institutes of Justinian, to this day, treaties, acts of parliament, judgments of the House of Lords and other courts in the mother country, our Congress, the Legislatures of the States, the Supreme Court of the United States and the State of Tennessee, have approved the rules of alluvion laid down by Bracton, as essential to the peace of nations and the repose of society among its individual owners of land. The rule was established and is maintained to forbid the disturbance of possession of alluvion by just such

evidence, inconclusive and inconsequential, as the defendants have offered in this case. Disputants are not allowed to go about the identification of the particles of soil composing the alluvion in order to claim it, as one would the fleshmarks of horses and mules, the identity of which comes in question. The only inquiry permitted, is that as to the process by which the changes have been made, whether it be a sudden or imperceptible one. No sudden process being proved in this case, the State of Tennessee and Polsdorfer are entitled to this Flour Island we see on the map, which is in evidence. The State of Tennessee, politically, by a possible, though not clearly proven, shifting of the boundary line between Arkansas and Tennessee; Polsdorfer by the State's grant in 1837, as the proprietor of the bank, and by the imperceptible accretion thereto of this alluvion called Flour Island.'

If Bracton, or any court of England or America, or any other authority, ancient or modern, has ever laid down the rule that where eleven witnesses swear positively that the accretions in controversy are accretions to the defendant's island and not to the plaintiff's shore land, and all the physical facts in the case, the lay of the land, the growth of the timber, the river lying up against the old original bank, the bluff banks themselves confirm this, we have not been able to find such authority.

Nor have we been able to find any court anywhere to say that such evidence is either "inconclusive or inconsequential." Nor any court that, instead of leaving the evidence to the triers of facts, itself decides that overwhelming evidence is no evidence. The question whether land formed in the changing bed of a river to a tract formerly on the shore of the river, or is newly made land unattached thereto, is a question for the jury. Price v. Hallett, 38 S. W. 451.

The question of whether the facts of this case made the land in question alluvion, and if alluvion, alluvion to what—was

for the jury. Or if it was reliction or avulsion—who owned the same, was for the jury. Or, especially, was the land in controversy alluvion to plaintiff's land? Did he under the evidence make out a legal title in fee to the land sued for? All of these were questions for the jury, certainly, on this record, and under the authorities, not for the court to decide.

As a matter of fact Bracton, writing in a country where the law of accretion was applied only to the imperceptible increase to the seashore or to the shore of a navigable stream where the *tide ebbed and flowed*, and in a country where there were no large fresh water rivers, could not and did not lay down the rule as it now exists in the United States, as laid down by most of the State courts, and certainly by the courts of Tennessee and Arkansas.

Bracton, Lib. 2, ch. 2, lays down the rule thus: "If an island arises in the middle of a river it belongs in common to those who have estates on the opposite shores; but if nearer one bank than the other, it belongs to him who is proprietor to the nearest shore."

We quote both Bracton and Justinian:

Henricus de Bracton, Vol. 1, Liber 2, Chapter 2:

"Habet etiam locum eadem species accessionis in insula nata in flumine, quae, si quidem mediam partem fluminis teneat, communis est eorum, qui pro indiviso ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cujuscunque fundi, quae latitudo prope ripam sit; quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praedia possident. Si autem insula in mari nata sit, quae raro accidit, occupantis fit, non tamen credas proprium alicujus agrum in formam insulae redactum, insulam esse, ut ecce, flumen dividitur in superiori parte et circuit agrum alicujus, et demum infra unitur, quo casu ejus erit ager cujus prius fuerat. Cavendum quoque erit in metienda vicinitate insularum, quia potest quis in hoc de facili decipi. Ponatur igitur punctus quidam in medio inter

"The same species of accession takes place in the case of an island which is formed in a river, which if it occupies the mid-channel, is common to those indivisibly," (i. e. undivided) "who on either side of the stream have farms on the edge of the bank, according to the width of the farm on the edge of the bank; but if it be nearer to one side it belongs to those owners who on that side have lands on the edge of the bank. But if an island is formed (born) in the sea, which rarely happens, it belongs to him who may occupy it, nevertheless you are not to suppose that the domain of any one reduced to the form of an island is an island. As for instance a river is divided above and encircles one's field and then united below, in this case the field belongs to him whose it had formerly been. Care should be taken also in measuring the nearness

untrumque agrum, et secundum hoc, si insula citra punctum sit, vel hujus tantum, vel illius tantum erit. Si autem sit et citra punctum, et in ipso puncto, et ultra, tunc pro indiviso, communis erit, ut tantum mihi de ipsa insula cedat, quantum continetur a medietate puncti usque ad agrum meum, et sic fiat in persona vicini quoad divisionem. Et videtur quod vicinitas et remotio insulae considerari debet secundum principium nativitatis suae, et inde erit, quod si inter insulam, quae mihi proximior est, et contrariam ripam vicini, quae est ultra flumen, alia sit nata insula, mensura fiet a mea insula et non ab agro meo. Et haec omnia tenenda sunt in insula, quae alvei solo adhaeret, et non quae virgultis sustentatur. Si autem insula rotunda inveniatur, difficile erit eam metiri, hoc tamen observetur, quod omne, quod propinquius est, mihi cedat, et ita vicino cedat, quod ei vicinius erit, et hoc nunquam fallet. Habet etiam locum haec in agris non limitatis; nam in limitatis non habet locum jus alluvionis. Sunt autem limitati, qui assignantur aliquibus certis locis et certis terminis, ubi scitur, quid cui sit datum, quid retentum et relictum. Praeteria agris limitatis non cedit insula ratione vicinitatis in flumine publico imo conceditur occupanti, et per consequens regi propter suum privilegium. Habet etiam locum eadem species accessionis in alveo fluminis, a flumine derelicto. Cedit enim eis, qui prope ripam fluminis praedia possident, pro modo scilicet latitudinis cujuscunque agri, quae latitudo prope ripam sit."[1]

of islands, because any one may be easily deceived in this. Let a point, therefore, be fixed midway between the two lands, and according as the land is within the point, it will be the sole property of the one or the other; but if it be within the point, and on the point, and beyond the point, then it will be common indivisibly," (i. e., undivided), "that so much of the island itself shall devolve to me, as much as is contained from the middle of the point to my land, and it shall be similarly done toward the person of my neighbor, as regards the division.

And it appears that the nearness or remoteness of an island ought to be considered in connection with the origin of its nativity (beginning), and so it may be that, if between the island, which is nearer to me, and the opposite bank of my neighbor, which is beyond the river, another island springs up, the measurement ought to be from my island and not from my field. And all these things are to be maintained in an island which adheres to the soil of the channel, and which is not supported by shrubs. But if the island be found to be round, it will be difficult to measure it; this, however, is to be observed, that everything which is nearer (my land) devolves to me, and so, also, what is nearer to my neighbor, accrues to my neighbor; and this (rule) never fails. But this holds place in case of land which is not limited, for in the case of land limited, the right of alluvium has no place. But lands are not limited which are assigned to individuals in certain localities and by certain boundaries, where it is known what is given to each, and what is retained or left. Besides, an island in a public river does not accrue to limited land by reason of neighborhood; on the contrary, it belongs to the occupier and consequently to the sovereign in virtue of his prerogative. The same kind of accession takes place in the bed of a river from the river leaving it. For it accrues to them who possess farms on the bank of the river, according to their respective fronts on the bank."[2]

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[2] Gaius I, 70, 71, 72, p. 275, is to the same effect. Also Ulpian I, 19, sec. 13.

Institutes of Justinian — Title, De Alluvio, Secs. 20 and 21, page 85:

Sec. 20. Praeterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adici quod ita paulatim adicitur, ut intellegere non possis, quantum quoquo momento tempori adiciatur.

Sec. 21. Quodsi vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere.

Sec. 20. Moreover, an addition which the river makes to your land by alluvion is yours by the law of nations, and alluvion is an imperceptible increase — that being considered to be added by alluvion which is added so gradually that you cannot perceive how much is added at each instant of time.

Sec. 21. But if the violence of the river force away a portion from your field and carry it to the field of your neighbor, it is clear that it remains yours.

From all of which it is clear that Bracton's law does not apply in this age and country. But if we broaden Bracton's navigable streams to any fresh water river where boats can run, then Bracton is not only not an authority for his Honor's position, but is directly against it, and in our favor. And so is Justinian.

Nor have the Supreme Court of the United States, nor the Supreme Court of Tennessee, approved the rules laid down by Bracton, as interpreted by his Honor, as essential to the peace of nations and the repose of society among its individual owners of land.

On the contrary, these courts have held that it is essential to the repose of society among its individual owners of land that an entirely different rule from that obtains.

At this day in a navigable stream it would be held in most of the United States that the island in midstream would not belong to the shore owners opposite the island, but to the States lying on either side; and if it was nearer one than the other, it would belong to the State nearest the island. And it is so held by the Supreme Court of the United States, of Arkansas and Tennessee.

Elder v. Burns, 6 Hump. 368.
Morton v. Nance, 3 Head 649.
Stewart v. Clark, 2 Swan 15.
St. Louis v. Ramsey, 53 Ark. 314.
Wallace v. Driver, 61 Ark. 429.
Barry v. Keokuk, 94 U. S. 336.

Nor is the court more fortunate, if it was of any consequence where he says "disputants are not allowed to go about the identification of particles of soil composing the alluvion in order to claim it, as one would the flesh marks of horses or mules." And this on page 257: "The increment of the sea or rivers, called alluvion or accretions, is not in any legal sense the fruit of the land, like apples growing from a tree, or fungus on plants, but it is the fruit of the waters," etc. The Supreme Court of the United States in the 23 Wallace case above cited does not agree with the trial judge in this, for it says that the alluvion attaching to the shore belongs to the shore owner. "It is the same with that as an *owner of a tree to its fruits*, and of the *owner of flocks and herds to their natural increase.*"

The court then proceeds to decide, without the intervention of a jury, and against all the evidence in the case, that Flour Island belongs to the State of Tennessee; and that by imperceptible accretions Polsdorfer, by his grant from the State of Tennessee in 1837, became and is the "owner of this accretion called Flour Island."

It was not left to the jury to say whether the Flour Island of 1823 still existed in part, and that the land in controversy was accretion to that land, as it ought to have been; it was not left to the jury to say whether the island was partially or entirely washed away, and, if entirely washed away, whether it reappeared on the Arkansas or Tennessee side of the river, and, in either of these events, if the land here in dispute was accretion to this reappearing island, the plaintiff could not recover. It was not left to the jury from the facts to say, that if this were a case of avulsion or sudden reliction, the land would belong to the State of Tennessee and not to Polsdorfer the plaintiff. It was not left to the jury to say that the only event in which the plaintiff could recover was in case they found upon the preponderance of the testimony that the land here in controversy was added to Polsdorfer's

grant and the Williams grant by imperceptible accretions to the shore in front of those two grants.

All little matters of that kind the court swept out of its path by saying that Flour Island belonged to Tennessee, and because Polsdorfer's claim was founded upon a grant from the State of Tennessee in 1837 of 5000 acres on the Tennessee mainland, that he was the "proprietor of the bank, and by the imperceptible accretion thereto of this alluvion called Flour Island, Polsdorfer became the owner of Flour Island."

In short, we submit that every fact found by the court should have been submitted to the jury, and it was error not to submit it to the jury.

It would have been reversible error if the jury had found for the plaintiff on a proper charge, for if plaintiff's testimony should be construed to show that the case was one of avulsion or sudden reliction, the verdict must have been for the defendant. If the defendant's testimony was the truth of the case the plaintiff could not recover.

There is no state of facts or legitimate deduction from any state of facts in this case that would support a verdict for the plaintiff; and therefore if there had been a peremptory instruction for the defendant it would have been correct.

Another and the only remaining view possible is contained in our instruction asked (pp. 269–270), which is as follows:

"If the fact is established that the land claimed by the defendant Ayres was surveyed in 1823 as part of the Territory of Arkansas, and that at that time and in 1837, when the Woodfolk grant issued, the main channel of the Mississippi River was on the east side of that island, it would be first United States land, and then on the admission of Arkansas it would belong to and become a part of the State of Arkansas.

"If, about the years 1839–40, or at any other time, the main channel of the Mississippi shifted from the east side of that island to the west side, the title of the island as part of the State would not be affected by that change, but the island

would remain part of Arkansas.* If the law is that when the river shifted from the east to the west side of the island containing the four sections of Troy township, in Arkansas, the boundary became fixed at the then center line of the abandoned channel, no more to be affected by accretion or reliction or otherwise as between the States, then I ask the court to charge that each State had title from that time to that line, and when the channel filled to that line, the land west of that line was Arkansas and the land east was Tennessee.

"If the line between the States became fixed to a certain point at the time of the cut-off, then I ask the court to charge that when the accretion from the Arkansas island reached that point, any accretion on the bed of the Old River east of that fixed line would be on land belonging to Tennessee under the water, and could not become the land of Polsdorfer while wholly separated from it by the ungranted land belonging to the State lying in the bed of the river,† neither could it afterward when met by accretions from the Tennessee shore suddenly become all his to that line between the States.

"If in the process of filling that channel the accretion from the Arkansas shore reached and crossed that line while there remained a body of water over that portion of the bed of the river which belonged to Tennessee as ungranted land, then that land at that time became by that cut-off all at once the property either of Polsdorfer or else it remained the property of the State as ungranted just as it was ungranted State land before that cut-off. If that be the law I ask the court to charge that Polsdorfer can not acquire title from the State by the sudden change of the river from one side of the island to the other—any more than Tennessee can acquire title to the island by the sudden change of the main channel from the one side to the other. The title to the bed of the stream

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* If the boundary river between States forms a new and distinct channel, the dominion and jurisdiction of the respective States are not affected.

Gould on Waters, p. 320.

† Where claimant's lands are separated from accumulated accretions by the land of another, however narrow the intervening strip, or whatever the size of claimant's tract behind it, the accretion does not belong to the claimant.

Sweringen v. City, etc., 52 S. W. 346.

having been, before the change, the property of the State as ungranted land, remains after the sudden change the property of the State as ungranted land, and does not become by the sudden change the property of Polsdorfer. In other words, if the State could not acquire title to the island by the change, so Polsdorfer could not acquire the title to the bed of the channel by the sudden change.

"I ask the court to charge that when the land in the old channel, by the change, became no longer navigable, it became so with the title to it vested in the State as ungranted land. If the State was the owner of both sides of the pond or lake, the lake would be subject to the law of accretion, and the owner of one side of the lake would have the same right to the accretions to his shore as the owner of the other side.

"If the respective owners were States the same rule would apply, and the accretion to Arkansas would be as much hers as those to Tennessee would be hers."

This we conceive disposes of the case so far as the reversal of the case is concerned.

But, as if the case is reversed, there may be another trial, this court is asked to rule on other errors of the trial judge, so that there will not be a repetition of these errors.

III.

Our next proposition is that the court erred in excluding this testimony from the jury.

In order to show the fact that original Flour Island had not all washed away, the defendant introduced the testimony of himself and David Laurence to the fact that in 1895 they cut a cottonwood tree on the island, and the concentric rings in the tree numbered 55 or 56. And, therefore, that the tree was 55 or 56 years old. Which, of course, would show that the tree began to grow on the island in 1848 or 1849. And, therefore, that the testimony of Miller, who swore that the island entirely disappeared in 1850, and the testimony of Laney that the island entirely disappeared in 1864, could not possibly be true in fact.

Thereupon the plaintiff read the deposition of James Stewart (pp. 124–128) to show that the concentric rings were not reliable to show the age of a tree.

Now, to show the incorrectness of this expert witness' testimony and also to show the correctness of our theory, the witness David Laurence was introduced and would have testified to this state of facts: That when he and Mr. Ayres cut down the tree and counted the concentric rings, in the year 1895, there arose a discussion between them about the concentric rings being a reliable indication of the age of the tree. And the witness then said to Ayres, I can test that matter at once. In the year 1860, thirty-five years ago, my brother and myself bored into a cottonwood tree on the mainland, and on the same character of soil as this, for water. And when we got all the water we wanted we plugged up the hole. (The witness explained that there were certain classes of cottonwood trees, which woodmen in that country knew, which contained quantities of drinking water, and that in very dry weather when water was scarce, they could, by boring a hole in one of these trees, get a supply of good drinking water.) He then said to Ayres, I can find that tree. And by cutting a chip from it where we had plugged it up, and counting the number of rings on the chip, I can tell whether it shows accurately the number of years since we bored into it, and thereby test the accuracy or inaccuracy of the concentric rings as showing the age of the tree Witness says he found the tree, cut the chip out where he had bored into the tree thirty-five years before, and found just thirty-five rings on the chip.

Upon objection this evidence was excluded upon the ground of incompetency and irrelevancy, and we excepted. p. 248.

That this was original evidence and entirely competent evidence for the purposes for which we proposed to introduce it, we submit to the court is entirely clear.

It would go in confutation of what Stewart testifies to, and in confirmation of what is admitted universally to be the fact, that the concentric circles on a tree show accurately the age of the tree, with some rare exceptions. Further, it was evidence that the exception did not exist in this particular case —it tending to show that no exceptional season had occurred in that period and neighborhood.

The testimony of Laurence as to the tree and the rings or growths was admissible as proof of facts pertinent to the matter on trial from which the jury were to draw their inferences. As such it was not in the nature of expert testimony, but was the normal and originally legal testimony to which the doctrine of expert evidence is an exception.

The general rule is that only facts are admissible, but opinions of experts is an exception. The jury is to draw the inference from facts in general, but an expert is allowed to draw inferences. This is exceptional—abnormal.

The facts pertinent to a matter on trial are always admissible. The inferences from those facts are only so under particular circumstances—one of which is where the witness has acquired knowledge from a large experience that gives him a peculiar insight, that makes his inferences instructive. But the introduction of such testimony is in aid of the jury's judgment, not in exclusion of it.

IV.

The court erred in excluding the following testimony:

Defendant claims to have bought the land here in controversy from John Lovewell and wife, in the year 1884. And defendant proposed to show by Lovewell and William Randall (pp. 176–177) that while Lovewell owned the island he sold some standing timber on it to one Petty. That J. C. Marley claimed the price of the timber, which was $80.00. And that Petty, without the knowledge of Lovewell, paid over the $80.00

to Marley. As soon as Lovewell was informed about the matter he wrote Marley that if he would come to Osceola (Arkansas) he would show him the records there, showing that he (Lovewell) had title to the island, the land here in controversy. That Marley declined, but that the two arranged a meeting at Fort Pillow. They met and discussed the matter, and as a final settlement of the controversy, Marley said, "Mr. Lovewell, if you will let me retain the $80.00 I will give up any claim I may have to Flour Island from this time forth." Lovewell agreed to this. And when he sold to Ayres and Ayres asked him about the title to Flour Island, he told him the source of his title, and then said in reply to Ayres' question whether he ever had any trouble about the title, "I have never had any difficulty or trouble about it, except with Mr. Marley." And he then stated the trouble and the settlement as above set forth. p. 272. And Ayres made the purchase. p. 272.

The witness Randall confirms all that Lovewell said about the settlement. p. 177.

This, the defendant claimed, was an estoppel on Marley and Polsdorfer, Marley's privy, to set up any claim of any accretion to the 5000 acres or any claim that this land is accretion thereto. p. 272.

The objection (p. 178) to the introduction of this testimony was (1) that it was a conveyance of land not in writing and could not be introduced for that reason, and (2) because Polsdorfer was not party to it and was not affected by it and had no notice of it.

Which objection was sustained and Ayres excepted.

Needless to say as to the second objection, that Polsdorfer was Marley's privy in estate, and was thereby a party to the settlement, affected by the settlement, had notice of the settlement, and was bound by the settlement.

Needless to say, also, that it was not necessary that the settlement should have been in writing in order to bind Marley, and to constitute an estoppel on Marley and his vendee.

In Bowles v. Smith, 1 Shan. Tenn. Cases at page 152, the Supreme Court, speaking through Judge McKinney, say:

"There is proof in the record tending to show that prior to the date of entry on which plaintiff's grant is based, McIver, after surveying various distinct portions of the better land within the bounds of the 40,000-acre grant to Donelson and Terrell, stated to different persons that he had appropriated as much of the lands as his grant called for, and did not want the remainder of the land.

"It is true as a general proposition, that a party can not be divested of the titles to lands by a mere parol disclaimer. But, if, in addition to such disclaimer or abandonment of title, he encourages or induces another to expend his money in acquiring a title by entry and grant to the land thus disclaimed, we are of opinion that he and *all persons claiming under him subsequent to such disclaimer*, would be estopped to assert any claim or title to the land thus appropriated by another. And, of course, the title of the former owner, in such a case, could not be regarded as an outstanding title."

Also Hamilton v. Zimmerman, 5 Sneed 41.
Cooley v. State, 2 Head 608.
Tipton v. Powell, 2 Cold. 23.
Caruthers v. Crockett, 3 Shan. Cas. 629.
85 Tenn. 154. 92 Tenn. 348. 98 Tenn. 561.
100 Tenn. 150. 2 W. M. Dig. 1492.

In 3 Shannon Cases, *supra*, the court defines estoppel to signify that a man for the sake of good faith and fair dealings, could be estopped from saying that to be false, which by his means had been accepted for the truth, when by his acts or representations he has led others to act.

See also 11 Heis. 68. 11 Hump. 433.
3 Head 173. M. & Y. 333.
10 Yer. 133. 2 Her. on Est. sec. 1069.
Same, page 1170 and cases cited.
Erhardt v. Boar, 3 McCrary 19.
Nelson v. Claybrook, 4 Lea 687.
And Broyles v. Nolan, 59 Tenn. 191.

It is well settled that admissions or silence of an adverse claimant present during a pending purchase estops him from setting up his claim.

The McIver case above quoted from shows that the presence of the claimant is not the controlling fact. But his admission and its effect on the mind of the buyer is the controlling fact.

In that case there was a public disclaimer of the title, and a purchase was made with a knowledge of that disclaimer. And the estoppel was properly held to bar his title just as much as if he had been present at the sale and admitted that he had no title.

It is the fact of the admission, and not the time of it or manner or proof of it, that is to be considered. The question is, did he admit the invalidity of his title? If he did, and that is proved, and if this was reported to the buyer and that is proved, the estoppel is operative. If the admission influenced the buyer as an inducement or any part of the inducement to his purchase, it is immaterial what was the medium of evidence by which the fact is made to appear. And any evidence which tends to establish the act is admissible. The jury is to judge of its sufficiency.

It must not escape notice that in Marley's contract with Hobbs, he, in apt words, restricts the operation of the contract "on the western boundary, where the river was originally called for," and only quitclaims as to land between that point "and where river now actually is." p. 22. And in Marley's deed to plaintiff he says: "And I do warrant said title, to as much as 5000 acres to pass to J. H. Polsdorfer." p. 35. And in Williams' deed to Polsdorfer, after warranty as to 400 acres, he says he "also conveys any lawful right he may have to the accretions or alluvion accrued in front of said 400 acres, to said John H. Polsdorfer." p. 32.

On the face of his deed, therefore, Polsdorfer is notified that the vendors will not warrant the title of the land sold, outside

of the 5000 and 400 acre tracts; and it may be stated further that neither plaintiff nor Marley ever paid, nor was the land here in controversy ever assessed for, taxes in Tennessee, so far as this record shows—the only assessment being on the 5000 and the 400 acres. pp. 43. 69. Nor does this record show that Polsdorfer ever paid one cent of the purchase money for the 5000 acres even.

But on another and independent ground it is admissible, even if there had been no sale. It was a matter of boundary. Was Old River the western boundary of the Woodfolk grant or not? This was a matter in dispute. Nothing is better settled in Tennessee law than that an agreement by parol to settle an uncertain boundary, or a parol settlement of a boundary, is valid and binds the parties to it.

Wilson v. Hudson, 8 Yer. 397.

Spears v. Walker, 1 Head 166.

On these authorities and on the proof on the various propositions above set forth and discussed, we claim that the court not only erred in the instructions actually given, but erred in refusing to give the instructions asked on pp. 259–260–261–262.

V.

The last series of errors of the trial court pertains to the judge's action and ruling with regard to the title which the defendant set up in court below to the land in controversy.

The pleas of the defendant are the general issue and statute of limitations of seven years, p. 7.

To defeat the plaintiff's recovery it was sufficient to show that he failed to make out a fee simple title; or that the property did not belong to either the plaintiff or defendant; or that it belonged to the defendant.

The defendant undertook to show in support of his defense among other things, that the title was in him. To this end he read in evidence a warranty deed from John A. Lovewell

and wife, to him on the 2nd day of August, 1884, p. 149, which deed conveyed to him "all of fractional section 17, all of section 18, all of section 19 and all of section 20, in township 12, range 12, east, *together with all the accretions thereto attached or belonging.*"

The defendant then introduced and read to the jury, tax deeds to all these sections of date June 30, 1897, pages 152 to 155 inclusive.

Under the Lovewell deed defendant says that having contracted with the United States Government to furnish it 50,000 sticks of timber, as soon as he bought the land here in controversy from Lovewell, he began to cut this timber off of this land and at other points along the Mississippi River, in order to comply with his contract from the Government. That in 1884 and 1885, without disturbance from anybody, he cut considerable timber off this island under his contract. That he sold brush off the land in controversy, to Hunter & Frey, pages 211–212, and recovered the $400 in the Coleman suit from them for it; had another controversy with Williams about brush cut off the island, in which Williams paid over the money, page 213; had a chancery suit with Hunter & Frey for other brush cut off the island, in which he defeated them and collected his money, page 213, (and by the way we were entitled to the decree in that case before the jury, page 227 to 229, which the court excluded and to which we excepted). This latter suit was for brush cut by Hunter & Frey on the island in 1893. So in 1884 Ayres took actual possession of the land here in controversy, and successively and successfully maintained that possession—such possession as overflowing land is susceptible of—from that d te up to and including the year 1893.

In 1891 or 1892 Ayres put five or six tenants on Flour Island, and they built houses there, holding the land for him,

pages 214–215; in short, from the time he bought and took the possession in 1884, he exercised all these acts of ownership over the property, and when his contract about the timber was finished, in 1885–86 until 1889, he said he would go over to the island every once in a while to see if there were depredations on it. p. 218. He says, on page 216, that it was difficult to keep anyone on the island because it badly overflowed.

So that we submit that under a deed purporting to convey a fee simple title, the defendant has shown more than seven years' actual possession of the land, or some part of the land in controversy.

And this in Arkansas gives a title in fee.

Sandels & Hill's Ark. Code, sec. 4815.

Ferguson v. Peden, 33 Ark. 421.

41 Ark. 45, 58 Ark. 142, also 151; 44 Ark. 479.

Indeed, under sections 4819 and 6634, S. & H. Ark. Code, defendant acquired a good title in two years after he took possession.*

But under the tax deed set forth at pages 152-155, defendant got a good title to all of sections 17, 18, 19 and 20, irrespective of what had been previously done or not done, and without aid from the statute.

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* These sections read:

Sec. 4819. No action for the recovery of any lands, or for the possession thereof against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector or commissioner of State lands for the non-payment of taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for the non-payment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained, unless it appear that the plaintiff, his ancestors, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action.

Act January 10, 1857, sec. 1. See 30 Ark. 44. 32 Ark. 131. 57 Ark. 523. 58 Ark. 151. 60 Ark. 169.

Sec. 6634. All actions to test the validity of any proceeding in the appraisement, assessment or levying of taxes upon any land or lot, or part thereof, and all proceedings whereby is sought to be shown any irregularity of any officer, or

VI.

The court erred in excluding the plat from the office of the Commissioner of State Lands at Little Rock.

This was a plat and survey made by Daniel Miller of fractional section 24 on the Arkansas shore and fractional sections 17, 18, 19 and 20 (on island) in Mississippi River, purporting to be certified by the Commissioner of State Lands of the State of Arkansas; and also the paper marked exhibit "O.' These are found at page 148 of the transcript of this cause.

That was an office paper.

S. & H. Arkansas Digest of Statutes, secs. 4476, 4479, 4484, 4486.

The paper was properly certified by the authorities under the statutes of the United States.

It is evidence that the land in controversy was a part of the State of Arkansas.

It is evidence of the claim of the State of Arkansas that it was a part of her territory, and part of a line of proofs of continued assertion of title from the time Arkansas became a State.

VII.

The court erred in refusing to appellant the benefit of the record of the circuit court of Mississippi county, Arkansas, showing the sale of the four fractional sections 17, 18, 19 and 20 to John A. Lovewell, the grantor of defendants. pp. 241–247.

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defect or neglect thereof, having any duty to perform, under the provisions of this chapter, in the assessment, appraisement, levying of taxes, or in the sale of lands or lots delinquent for taxes, or proceedings whereby it is sought to avoid any sale under the provisions of this chapter, or irregularity or neglect of any kind by any officer having any duty or thing to perform under the provisions of this chapter, shall be commenced within two years from the date of sale, and not afterward.

32 Ark. 131. 46 Ark. 96. 53 Ark. 204. 55 Ark. 192. 52 Ark. 400.

If this was a valid record, it was evidence of title.

If it was invalid, it was evidence of exercise of jurisdiction of the State of Arkansas over the property in controversy.

It was perfected by lapse of time.

VIII.

The court erred in excluding from the jury the deed from the commissioner to John A. Lovewell. pp. 145–148.

At page 148 the court below allowed the deed to be read, but withdrew it from the jury at p. 247. This was error.

The deed, if a valid deed, showed a good title in the defendant. It was a deed valid upon its face.

S. & H. Arkansas Digest, section 6623.

No proceeding to attack it was filed within two years.

Ibid 6634.

If the deed was invalid, it was good as color of title.

Office Supreme Court
FILED
OCT 9 1902
JAMES H. McKENNEY,

No. 89.

Br. of Turley & Heiskell for Pet. (on

Filed Oct. 9, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

E. M. AYRES, Plaintiff in Error,

vs.

JNO. H. POLSDORFER AND WIFE, Defendants in Error.

Motion and Petition for Certiorari.

THOS. B. TURLEY AND
J. B. HEISKELL,
Attorneys for Petitioner, E. M. Ayres.

S. C. TOOF & CO., PRS. & LITHS. MEMPHIS

In Supreme Court of the United States.

E. M. AYRES, Plaintiff in Error,

vs. } No. 310

JOHN H. POLSDORFER AND WIFE, Defendants in Error.

MOTION.

Comes the plaintiff in error and moves the court to grant unto him the writ of certiorari in order to bring this case from the Circuit Court of Appeals to this court, that the action of that court may be reversed and the case decided on the merits, to the end that right and justice may be done in the premises.

He prays the court for this writ upon the grounds set forth in the petition here following, and he asks the court to allow him in support of this motion and petition to use the briefs of his counsel and record now on file in this court on his writ of error.

T. B. TURLEY AND
J. B. HEISKELL.

PETITION.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of E. M. Ayres respectfully represents to your Honors that on the —— day of April, 1901, he obtained upon the fiat of the Hon. Justice Harlan of this court a writ of error to bring before this court the record and proceedings of the Circuit Court of Appeals for the Sixth Circuit of the United States in the case of petitioner E. M. Ayres, plaintiff

in error, v. John Polsdorfer and Wife, defendants in error, and that by way of return to said writ, a copy of the said record and proceedings was filed in this court and the cause regularly stands upon the docket of this court as No. 310, to be reached in due course for trial about the middle of November of the ensuing October term of this court.

That on the 9th day of September, 1902, petitioner's counsel received notice that on the 20th day of October, 1902, in said term, or as soon thereafter as the same can be entertained, the defendants in error will move the court to dismiss the said writ of error. The motion is accompanied by a brief which alleges for reason that petitioner has mistaken his remedy, and should have resorted to the remedy by certiorari, if he was entitled to any remedy whatever. And in consequence of the said notice and brief, petitioner is advised that it is necessary for him, for further security of his position in this court, to ask the aid of this court by granting him a writ of certiorari under the discretionary powers conferred upon this court in that behalf, to bring the said cause into this court, so that in case the court shall be of the opinion that the said writ of error was not the proper remedy in this behalf, the petitioner shall not be wholly deprived of his rights by reason of a misconception of his proper remedy.

Petitioner states that the writ of error by which the case was brought into the Circuit Court of Appeals was dismissed on the hearing in that court without any trial on the merits, because this petitioner had not joined with him in the said writ of error, one Price, who was sued in the same action of ejectment with this petitioner. That petitioner had in no manner any connection with the said Price, in act, or claim, or interest. That on the contrary, his claim was adversary to that of said Price to the same extent that it was to that of Polsdorfer. That petitioner claimed title to the property as land lying in the State of Arkansas, while the said Polsdorfer

and Price both claim the same under grants from the State of Tennessee. That the petitioner could not therefor assign the errors against Price as errors affecting him, and that Price could not assign the errors which affected petitioner as prejudicial to him, when in fact they were in the main to his advantage. Upon this ground of non-joinder of a party having no joint or common interest which could be severed, and for want of summons and severance of what had no link, or ligation, to give them any connection whatever, and upon this cause alone, petitioner was turned out of court, and the court refused to review or consider the many errors in the proceedings of the court below or to reverse the same.

Petitioner is advised that the rule thus misapplied is held by the said Court of Appeals, as appears by the opinion of the court filed in said court, transcript p. —, to be a matter which goes to the jurisdiction of that court, and that by reason of said non-joinder the jurisdiction of said court failed to attach. Petitioner is advised that to define the jurisdiction of that court is one of the class of cases so important in its character that it strongly demands of this court to exercise its revisory jurisdiction, and appeals to the discretionary power of the court in using the writ of certiorari.

Petitioner further states that there are already numerous reported decisions of the various Circuit Courts of Appeals on the subject of the non-joinder of plaintiffs in error in which conflicting decisions have been rendered, and he is advised that in the interest of uniform practice it has been held by this court, that its power to grant the writ of certiorari ought to be exercised.

Petitioner is advised further that the decision of the said Court of Appeals is directly in disregard of the holding of this court in the case of Hanrich v. Patrick, 119 U. S. 156, in which it was held that the joinder of defendants adversely interested in an ejectment suit was not necessary or proper,

and he submits that such disregard for the solemn adjudication of this case, is a cogent reason for the exercise of the discretion of the court in granting the writ of certiorari.

Petitioner is advised that a rule of practice by which a party with a meritorious cause may be deprived of his freehold, and which is frequently invoked, as here, to evade justice, is a matter of such consequence to the administration of justice, as appeals strongly to this court to guard against its misapplication, by resort to the remedy by certiorari.

Petitioner further states that the writ of error granted in this case from this court was applied for and granted upon the ground that there was other ground for jurisdiction in the Circuit Court of the United States than the diverse citizenship of the plaintiff below and this defendant—in that, the title was claimed under grants from different States. This ground is true; but defendant in error here now insists that a tax title from the State of Arkansas as based upon a United States grant of the land as Arkansas land, is not a grant.

Petitioner is advised that this contention is rather specious and technical than sound—and that whatever passes the title to a freehold is a grant within the true meaning and intent of the Constitution of the United States, and the laws passed thereunder giving jurisdiction to the courts of the United States. But however this may be held, he is advised that the purpose and policy of said provision is to provide against the collisions likely to ensue between contiguous States in regard to the lines and boundaries between them, and if this claim is not expressly within the provisions of the act establishing the Circuit Courts of Appeals as to grounds of jurisdiction, they are so entirely within the policy of those provisions that they present a ground for the exercise of this discretion to grant a certiorari such as is imperative on the court, to prevent the disastrous conflicts of jurisdiction between States, by settling all contests likely to involve them in such conflicts. In this

case the Circuit Court of the United States is a substitute for the State court of Tennessee. Its authority was and is in such cases precisely that of a State court. The judgment of the court of Tennessee, if rendered by the State court, would be executed by a State officer. If he should be met by an officer of the State of Arkansas executing a process in favor of petitioner requiring him to put petitioner in possession, it would be likely to occasion a conflict, and it seems that the provision as to titles emanating from different States was contrived and inserted to meet and prevent such a possibility.

Petitioner is advised that such a view of the purpose and policy of the Constitution imposes upon this court the highest obligation to use the means beneficently placed within its reach by the provision for the writ of certiorari, to avoid all temptations in the coterminous States to conflicts of jurisdiction and of executive officials, by requiring decisions on the merits in all proper cases in which such questions arise, as to conflicts of the title and boundary of States, on a full investigation as to the boundary and title, and calls upon the court to use its supervisory powers to the fullest extent to prevent such conflict.

Is this then a proper case on the merits?

It appears in this record that the land in controversy consists of an island and its accretions. The island existed in 1823, when the United States surveyed the land as part of what afterward became the State of Arkansas. R. 192, ans. 10. At that time the Mississippi ran on both sides of the island, the widest portion separating it from Arkansas, but the main body of the river ran between it and the Tennessee shore. R. 191, ans. 6.

In 1837 Tennessee granted the body of the land claimed by Polsdorfer, 5000 acres, calling for "a stake on the bank of the main channel of the Mississippi river." R. 13. At that time and until the great freshet of 1839 or 40—not fixed pre-

cisely—the boating channel ran where petitioner claims the State line of Tennessee to be, and was the main channel called for in the Polsdorfer grant. R. 191, 232, ans. 7–8; 232 (16.) In that great freshet the river deserted the old main channel on the east side of this island and made its main channel on the west side of the island. R. 191, ans. 8–9.

The record at p. 230, 231, shows the United States issued two patents, one to D. Hardiman, 1st February, 1843, and one to J. C. Barnes, May 12, 1847, to the island as an island in the Territory of Arkansas as being fractional sections 17 and 18, to said Hardiman, and sections 19 and 20, to said Barnes. The record, p. 232, shows in a book in the clerk's office of Mississippi county, Arkansas, that Hardiman entered the land in 1836 and Barnes in 1846. The land was occupied and used by the grantees and others under them as citizens of Arkansas. It was sold for taxes as Arkansas land and petitioners grantor bought it. R. 149, 172. They paid taxes in Arkansas, and there is an overwhelming preponderance of evidence that the same island exists at the present day, and is the land claimed by Polsdorfer as accretion to his Tennessee land. The contention of petitioner was in the circuit court that the accretion was to the island. The record shows beyond a doubt that the accretions were to the island by the greater number and credibility of the witnesses, by the trees with more than fifty years of growth, by the shape and formation of the accreted land, by the exercise of jurisdiction by the State of Arkansas uninterrupted until after the war between the States, by the United States entries, by the collection of taxes proved by the tax collector orally, by the sale of the land for taxes in the Arkansas court after the war, by the map of the public lands in the Land Office at Little Rock, by the map of Mississippi county in the clerk's office of that county, by the testimony of persons who lived on the land, hunted on it, fished from it, slept on it, hid from the Federal soldiers on it, cut wood

on it; by the fact that refugees from Tennessee harbored on it and defied Tennessee officers, and that the officers submitted. R. 98. By repeated decisions of Tennessee courts that petitioner was the owner of the timber cut from it and sold in Tennessee (Rec. 202–6, 227), by the admission of Joe Marley, Polsdorfer's immediate grantor; operating in Tennessee as an estoppel to bar his right—by his refusal to warrant title to the land as accretion to the 5000 acres. R. 35. While on the part of Tennessee no claim of jurisdiction was ever asserted, until Price and Roy obtained grants from the State on entries made in the entry taker's office of Lauderdale county, on which a grant issues of course.

With this weight of evidence to support petitioner's claim, the district judge took the case from the jury and instructed them to find for the plaintiff. Petitioner is advised that there was not only evidence to be left to the jury, but evidence to have imperatively required the district judge to grant a new trial had the case been left to the jury, and had they found for the plaintiff.

The action of the district judge can be accounted for only upon the ground that he attributed some mysterious virtue to the word "*avulsion.*" A reference to the record will show, p. 258, that he wrote and filed an opinion in which he states "there is not a particle of evidence of avulsion, and therefore the increment belongs to Polsdorfer as riparian owner."

Petitioner is advised that the change in the bed of the river from the east to the west side of the island, was not an avulsion, but it was certainly a change which did not affect the territorial claim of the State of Arkansas or the title of the petitioner.

There is one witness whose deposition was read and is in the bill of exceptions who states that the island was swept away after the change of the main body of the river to the west side; but if he means any more than that the original

nucleus of the 250 odd acres was washed away, the testimony is irresistible which contradicts him; and even if this is what he means, the weight of the evidence is against him. While the evidence of the continuous existence of the island, including in that term its accretions, has no appreciable contradiction.

Petitioner is therefore advised that the land sued for by defendants in error is land in the State of Arkansas, though now in low water joined in various places to the Tennessee shore. It is not Tennessee territory, and not being in Tennessee or within the Sixth Circuit, the said circuit court at Memphis had no local jurisdiction to try and adjudge the title; and that the courts of the State of Arkansas or the Circuit Court for the Eastern Division of the Eastern District in Arkansas as a substitute *pro hac vice* for a court of Arkansas, alone could try and determine the controversy in this case.

That the land is the property of petitioner, and certainly not the property of the said Polsdorfer, and upon the cause being tried in this court on the merits or being reversed on the error of the Court of Appeals, he is entitled to have the case reversed and sent back to the circuit court at Memphis for a new trial.

Petitioner, therefore, if he has mistaken his remedy by writ of error, prays that this court will now grant him a writ of certiorari to bring the case (*de jure* as well as *de facto*) into this court, that right and justice may be done in the premises. And since the record is already here printed and filed, and the case will be presently reached on the hearing docket of this court, he prays that the court will treat the said transcript so returned to the writ of error as a return to the said writ of certiorari, and that the said motion of the said defendants in error to dismiss may be heard with the cause on the merits together with the motion for certiorari.

Am. Sug. Ref. Co. v. New Orleans, 181 U. S. 377–383.

Your petitioner states that the objection to the delay in applying for this relief ought not to prevail against his claim; that he has been guilty of no failure of diligence; that his application for relief was prompt and in proper time; that his mistake, if such it be, is no fault of his, but merely an error in the judgment of counsel; that it has resulted in no delay beyond what would have occurred by obtaining the admittedly proper remedy at the proper time; that the defendant in error, if he cared for the matter of delay, could have made his motion on the first day of the October term, 1901, and that by delaying to make the motion with a view to obtain an advantage of lapse of time as a bar to the remedy now asked for, he has precluded himself from now taking that objection; that the delay has operated in no manner to the prejudice of defendants in error as the case will stand for hearing and be tried on the writ of error exactly at the time that it would have been, if this remedy had been pursued when the writ of error was—and so, as there is no peremptory bar, and it is matter within the sound discretion of the court to decide whether the application is within time, he prays the court that it will not hold him to have lost his right by a merely nominal delay, but that the court will grant the writ as herein prayed for.

In support of his petition he prays the court to allow him to file and use herewith the briefs and record already on file in support of his writ of error.

T. B. TURLEY AND
J. B. HEISKELL.

Office Supreme Court U. S.
FILED
OCT 22 1902
JAMES H. McKENNEY,
Clerk.

No. 89.

Br. of Turley & Heiskell for P. E.

Filed Oct. 22, 1902.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

E. M. AYRES, Plaintiff in Error,

vs. } No. 310

JNO. H. POLSDORFER AND WIFE, Defendants in Error.

Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of the Plaintiff in Error

ON DEFENDANTS' MOTION TO DISMISS AND TO AFFIRM.

THOS. B. TURLEY,
J. B. HEISKELL,
Attorneys for Plaintiff in Error.

J. C. TOLF & CO., PPS. & LITHS. MEMPHIS

BRIEF OF PLAINTIFF IN ERROR

On Defendants in Error's Motion to Dismiss and to Affirm.

I.

The first ground relied on by appellee in support of his motion to dismiss the writ of error is, that the judgment of the Circuit Court of Appeals dismissing the writ of error sued out from that court to the Circuit Court is final.

Section 5 and 6 of the act of March 3rd, 1891, regulate the method of reviewing the decrees and judgments of the District and Circuit Courts of the United States. Section 5 provides that an appeal, or writ of error, may be taken from said court direct to the Supreme Court of the United States in six classes of cases enumerated therein. Section 6 provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal, or by writ of error, final decisions in said district and circuit courts, in all cases other than those provided for in section five, unless otherwise provided by law.

It further provides that all judgments and decrees of the Circuit Court of Appeals, shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also, in all cases arising under the patent, revenue, criminal and admiralty laws. It provides further, that in all cases in which the judgment or decree of the Circuit Court of Appeals is not made final, by the provisions in said section 6, there shall be right of an appeal, or writ of error, or review of the case by the

Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

If we give to the language used in these two sections its ordinary meaning, it would seem, that in the six classes of cases mentioned in section 5, the appeal or writ of error must be to the Supreme Court, and not to the Circuit Court of Appeals, and that in all other cases the writ of error or appeal must be, at least in the first instance, to the Circuit Court of Appeals. In this latter class of cases, if the jurisdiction is dependent entirely upon diverse citizenship; or, if it rests upon the patent, revenue, criminal, or admiralty laws of the United States, the decision of the Circuit Court of Appeals is final, and no writ of error or appeal can be taken to the Supreme Court of the United States. But, in any other cases over which the Circuit Court of Appeals has appellate jurisdiction there may be a writ of error or appeal to the Supreme Court.

The Northern Pacific Railroad Company v. Amato, 144 U. S. 465, and Union Pacific Railway Company v. Harris, 158 U. S. 326, are examples of cases not embraced in section 5 of the act of March the 3rd, 1891, over which the Circuit Court of Appeals has appellate jurisdiction, but in which its decrees and judgments are not final, and which are subject to further review by appeal or writ of error to the Supreme Court of the United States.

The first of these cases was instituted in the Supreme Court of New York. The complaint showed that the plaintiff was a resident of New York, and the defendant, a corporation chartered by Congress, a citizen of the United States. The case seems to have been removed to the Circuit Court of the United States, on the ground that the defendant was a corporation created by act of Congress. There was judgment for the plaintiff in the Circuit Court of the United States. The case was carried by writ of error to the Circuit Court of

Appeals, where the judgment of the Circuit Court was affirmed, and thereupon, the case was brought by writ of error, to the Supreme Court of the United States. Motion was made to dismiss the writ of error because the judgment of the Circuit Court of Appeals was final. This court held that the case did not depend entirely upon the fact that the opposite parties were, one an alien and the other a citizen of the United States, or, one a citizen of one State and the other a citizen of a different State; but it depended also upon the fact that the defendant was a corporation created by act of Congress. It held further, that the case was not provided for in section 5 of the act of 1891, and that it was not one of that class of cases in which the judgment or decree of the Circuit Court of Appeals was made final by section 6 of said act. The result was, the motion to dismiss was overruled.

The second of said cases was instituted in the Circuit Court of the United States. The jurisdiction was expressly placed upon diverse citizenship of the parties. The defendant was a corporation created under the laws of the United States. The case was carried by writ of error to the Circuit Court of Appeals, and from that court by writ of error to the Supreme Court. The motion to dismiss was made upon the same ground as in the first case above, and was overruled for the same reason. The act of March, 1891, has been construed by this court in various other cases. One of the earliest of these cases is McLish v. Roff, 141 U. S. 661. "That was an ejectment suit brought in the United States Court for the Indian Territory. The jurisdiction of the court was challenged by demurrer. The demurrer was overruled. The defendant insisted that he was entitled to have the question of jurisdiction carried by writ of error to the Supreme Court before the trial of the case on its merits in the lower court, and he asked the lower court to certify the question of jurisdiction to the Supreme Court, and to proceed no further until the jurisdic-

tion should be decided by the Supreme Court. This request was denied by the lower court upon the ground, that after a trial of the case upon the merits, the defendant could carry the question of jurisdiction to the Supreme Court. This court sustained the action of the court below. In the course of the opinion the court announced that it was a matter of public history, and manifest from the face of the act of 1891, that its primary object was to facilitate prompt disposition of cases in the Supreme Court, and to relieve it of the enormous overburden of suits and cases, resulting from the rapid growth of the country and the steady increase of its litigations."

It further announced, that "The true purpose of the act, as gathered from its context is, that the writ of error or appeal may be taken only after final judgment, except in the cases specified in section 7 of the act. When that judgment is rendered the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court."

Another case is the Colorado Central Consolidated Mining Company v. Turck, 150 U. S. 138. That was an action of ejectment, brought in the Circuit Court of the United States for the district of Colorado. In the complaint the jurisdiction was based solely upon diverse citizenship. The defendant, in its second defence, raised a question which it claimed depended upon the construction and application of the law of the United States. The case was tried on its merits in the Circuit Court, where a verdict and judgment were rendered for plaintiff. Writ of error was taken to the Circuit Court of Appeals, where the judgment of the Circuit Court was affirmed, and the case was then brought by writ of error to this court. Motion to dismiss the writ of error was sustained,

upon the ground that when the original jurisdiction of the Circuit Court of the United States is invoked, upon the sole ground that the determination of the suit depends upon some Federal question, it must appear at the outset, and from the declaration of complaint, that the suit is of that character. The court held that in the complaint the sole ground of jurisdiction set forth was diverse citizenship, and this being so the judgment of the Circuit Court of Appeals was conclusive. It will be noticed that the case was tried on the merits in both the Circuit Court and the Circuit Court of Appeals.

In Nishimura Ekui v. the United States, 142 U. S. 659, this court held that under the act of 1891, whenever the constitutionality of a law of the United States was involved, an appeal or writ of error would lie direct from the Circuit Court of the United States to this court.

In Horner v. United States, 143 U. S. 571, the question arose as follows: Horner was arrested and brought before the commissioners of the United States for violating section 3894 of the revenue statute. Horner obtained a writ of habeas corpus from the Circuit Court of the United States for the Southern District of New York, which writ, on hearing, was by that court dismissed. Horner thereupon appealed to this court. It was insisted that this court had no jurisdiction of the appeal, and that the appeal ought to have been taken to the Circuit Court of Appeals. The court held, that inasmuch as the constitutionality of section 3894 was drawn into question the appeal lay directly to this court under section 5 of the act of March 3d, 1891. It held further, that in cases where the constitutionality of a law of the United States is drawn into question, this court acquires jurisdiction under said act of 1891 of the entire case and all questions involved in it, and not solely of the question of the constitutionality of the law of the United States, distinguishing its jurisdiction in

such cases from appellate jurisdiction given by section 5 over questions involving the jurisdiction of the Circuit Court of the United States.

In the United States v. Jahn, 155 U. S. 109, the facts were as follows: Jahn & Co. withdrew from the warehouse in New York for export to Montreal certain molasses which had been imported into New York. Upon such withdrawal the collector of customs exacted a charge of ten cents per cask for gauging, etc., under the provisions of section 3023 of the Revenue Statute. Jahn & Co. protested, claiming that said section has been abolished by a later law. The matter was taken before the Board of General Appraisers, which sustained the collector. Jahn & Co. appealed to the Circuit Court of the United States, which court reversed the decision of the Board of General Appraisers. The United States then appealed to the Circuit Court of Appeals and assigned for error that the Circuit Court of the United States had no jurisdiction of the matter, because the decision of the board of appraisers was final and conclusive. Thereupon the question of whether the Circuit Court had or had not jurisdiction was certified to this court by the Circuit Court of Appeals. In construing sections 5 and 6 of the act of 1891 this court held that the Circuit Court of Appeals exercised appellate jurisdiction under the 6th section of all other cases than those in which the jurisdiction of this court is exercised under section 5. In construing that portion of the 5th section, under which this court exercised appellate jurisdiction in cases in which the jurisdiction of the Circuit Court of the United States is in issue, it pointed out the difference between cases of this kind and the other classes of cases over which this court is given appellate jurisdiction by section 5. Its language on this point was as follows: "The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in

which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. But in such other cases the requirement that the question of jurisdiction alone should be certified for decision was intended to operate as a limitation upon the jurisdiction of this court of the entire case, and of all questions involved in it, a jurisdiction which can be exercised in any other class of cases taken directly to this court under section 5." It held further, that when the jurisdiction of the Circuit Court was attacked, if that court sustains its jurisdiction and decides against the defendant on the merits, the defendant can elect either to bring the case direct to this court under section 5 or to carry it to the Circuit Court of Appeals, section 6, and have the question of jurisdiction certified from that court to this court. If he elects to bring the case direct to this court under section 5 he waives his contention on the merits of the case, because as explained the act does not contemplate two appeals or writs of error and two hearings on the whole case at the same time, by the same parties, in two different appellate courts. If the defendant carries the case to the Circuit Court of Appeals he thereby saves his contention on the merits, and the case will be held in that court until the question of jurisdiction is certified to this court and here decided.

See also Glaspell v. Northern Pacific R. R. Co., 144 U. S. 211.

The case of Borgmeyer v. Idler, 159 U. S. 408, was very similar in its facts and was identical in its procedure with the case of Colorado Mining Company v. Turck, 150 U. S. 138, commented on above. It was disposed of in the same way and for the same reason. It will be noticed that in that case, as in the case of the Mining Company v. Turck, there

was a trial on the merits, both in the Circuit Court of the United States and the Circuit Court of Appeals.

The next case is Chappell v. United States, 160 U. S. 508, 509. It was again held that where the constitutionality of a law of the United States is drawn into question the appeal or writ of error should be taken under section 5 of the act of 1891 direct to this court, which has power to dispose of the whole case.

In Cornell v. Green, 163 U. S. 75, which was a direct appeal in equity from the Circuit Court of the United States to this court, upon a claim that a Federal question was involved, this court held that inasmuch as the suit had been instituted originally in the Circuit Court of the United States it was necessary that the Federal question should have been raised in that court, and finding no such question was raised in that court the appeal was dismissed. It was a case which ought to have been taken to the Circuit Court of Appeals, because of diverse citizenship.

Ex parte Jones, 164 U. S. pages 692 and 693, is an affirmance of the case of Mining Company v. Turck, 150 U. S. 138, and Borgmeyer v. Idler, 159 U. S. 408. This, like the two cases just cited, was a case brought in the Circuit Court of the United States solely on the ground of diverse citizenship. There was a trial on the merits in the Circuit Court. The case was then carried to the Circuit Court of Appeals, where it was again tried on its merits. An appeal was prayed to this court, which was denied by the Circuit Court of Appeals, and thereupon a petition for mandamus was filed in this court to compel the Circuit Court of Appeals to grant said appeal, which petition was refused on the ground stated above.

In Robinson v. Caldwell, 165 U. S. 359, the procedure was as follows: Suit was instituted in a district court in Idaho. It was removed to the Circuit Court of the United

States, presumably on adverse citizenship. It was tried in that court on the merits, and a decree was rendered in favor of the plaintiff. The defendant then appealed direct to this court. He also prosecuted an appeal to the Circuit Court of Appeals, which court again determined the case on the merits in favor of the plaintiff. In this court the defendant insisted that the Circuit Court of the United States had no jurisdiction to entertain the case. This court dismissed the appeal, because the case having been carried by appeal to the Circuit Court of Appeals no question of jurisdiction had been certified from that court to this court. It again lays down the rule that it was not the purpose of the judiciary act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits, both in this court and in the Circuit Court of Appeals.

In Holder v. Aultman, 169 U. S. 81, the plaintiff sued the defendant in the Circuit Court for the Eastern District of Michigan to recover the price of agricultural machines. The defendant plead that the plaintiff was a foreign corporation and had not complied with the provisions of the statute of Michigan, making void all contracts entered into in that State by foreign corporations which had not complied with the provisions of said act. The case was tried in the Circuit Court, and that court held that the contract was made in Ohio and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that State, under said contract, was in conflict with the Constitution of the United States. Judgment was thereupon rendered for plaintiff, and the defendant sued out a writ of error from this court on the ground that the case was one in which a law of the State was claimed to be in contravention of the Constitution of the United States. This court held that the case was rightfully brought direct to it on writ of error, under section 5 of

the act of March 3d, 1891, and that this court had jurisdiction over the whole case.

In Loeb v. Columbia Township Trustees, 179 U. S. 473, this court held that where a case is brought direct from the Circuit Court of the United States to this court, by writ of error, under section 5 of the act of 1891, on the ground that a state law is in conflict with the Constitution of the United States, it is not necessary that this question should be disclosed in the original petition, bill or complaint, but it is sufficient if it clearly appears anywhere in the record. It appeared in this case by the opinion of the circuit judge. The suit was instituted in the Circuit Court of the United States on the ground of diverse citizenship, and the question that a statute of Ohio was repugnant to the Constitution of the United States was raised by the defendant, and appeared, as stated, by the opinion of the circuit judge. It was insisted that when the original jurisdiction of the Circuit Court is invoked by the plaintiff, only on the ground of diverse citizenship, a claim by the defendant of the repugnancy of a State law to the Constitution of the United States, made in his answer or plea, or in the course of the trial, is not sufficient to give this court jurisdiction upon writ of error to review the final judgment of the Circuit Court. This contention was not sustained, and this court pointed out the difference between a case like the one which was then before it and cases involving the jurisdiction of the Circuit Court, and which could be carried on the question of jurisdiction either directly to this court, or on the merits to the Circuit Court of Appeals, which court could certify the question of jurisdiction to this court. In the latter class of cases the court said if the original petition or complaint in the Circuit Court invoked the jurisdiction of that court, solely on diverse citizenship, and the case was carried to the Circuit Court of Appeals, it could not then be brought to this court, because

the defendant, in the course of his defence, had raised some question embraced in section 5 of the act of 1891.

The court again cited, with approval, the holding in Robinson versus Caldwell, 165 U. S. 359–362, that, "It was not the purpose of the judiciary act of 1891, to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits, both in this court and in the Circuit Court of Appeals."

It may be of some avail to analyse and compare some of these decisions.

The case of Mining Company v. Turck, 150 U. S., and its kindred cases, referred to above, announce the doctrine broadly, that when the original jurisdiction of the Circuit Court of the United States is invoked it must appear at the outset from the declaration, or bill, or complaint of the party suing, that it is a case of which the Circuit Court, at the very time its jurisdiction is invoked, could properly take cognizance. Under this doctrine they hold, that if an original suit is brought in the Circuit Court solely on the ground of diverse citizenship, and is carried to the Circuit Court of Appeals, no other ground of jurisdiction can be looked to. In the particular case of Mining Company v. Turck, the complainant alleged diverse citizenship. The defendant in the course of his defense relied upon a Federal statute. The case was carried by defendant, as already stated, to the Circuit Court of Appeals, and when that court decided against him he sued out a writ of error in this court, which writ of error was dismissed on the ground stated above.

There are cases of Federal jurisdiction which are not embraced under section 5 of the act of 1891, in which the judgment or decree of the Circuit Court of Appeals is not final under section 6 of said act. Examples of these cases have been cited above. See 144 U. S. 471; 158 U. S. 326. In these cases the declarations or complaints disclosed that the original

jurisdiction of the Circuit Court was invoked on account of diverse citizenship, but they further disclosed that the defendants were corporations organized under the laws of the United States.

Suppose a ground of Federal jurisdiction not embraced in section 5 of the act of 1891, and in which the judgment or decree of the Circuit Court of Appeals is not conclusive, is first disclosed by defendant's plea, or by subsequent proceedings, in a case in which the original jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship, or on one of the other grounds in which the decision of the Circuit Court of Appeals is final. If, in such case, there was a judgment against the defendant, and he carried the case by writ of error or appeal to the Circuit Court of Appeals, and judgment was there rendered against him, and he then sought to bring the case to this court by writ of error or appeal, how would it stand in this court?

If the doctrine laid down in Mining Company v. Turck be enforced, would the writ of error in this court be dismissed because the original declaration or complaint placed the jurisdiction of the Circuit Court solely on a ground in which the decree or judgment of the Circuit Court of Appeals was final? If so, then wherever a case involved two grounds of Federal jurisdiction, neither of which is embraced in section 5 of the Act of 1891, and as to one of which the judgment or decree of the Circuit Court of Appeals is final, and as to the other is not final, then the plaintiff suing in the Circuit Court can, by invoking its jurisdiction solely on the ground as to which the judgment or decree of the Circuit Court of Appeals will be final, deprive the defendant of the right given him to carry the case from the Circuit Court of Appeals to this court by writ of error or appeal. Such a result would be contrary to the principle laid down in Loeb v. Columbia Township Trustees, *supra*, which case, it will be seen, discountenances

the idea that one party can, by the method or way in which he brings his suit, deprive the other of a right of review by this court. Further, the case of Loeb v. Columbia Township Trustees, as already shown, holds that if any one of the Federal questions enumerated in section 5 of the act of 1891 appear anywhere in the pleadings, or in the record, the case can be brought by writ of error to this court.

Suppose two cases then, one like the case of Loeb v. Columbia Township Trustees, in which the declaration discloses diverse citizenship as the ground of original jurisdiction in the Circuit Court, and one of the Federal questions enumerated in section 5 of the act of 1891 is disclosed in subsequent proceedings in the case. An appeal or writ of error lies to this court. The other of the nature of the Northern Pacific Railroad Company v. Amato, and the Union Pacific Railway Company v. Harris, *supra*, in which the original jurisdiction of the Circuit Court is invoked solely on the ground of diverse citizenship, and in which the Federal question not embraced in section 5 of the act of 1891, and as to which the judgment or decree of the Circuit Court of Appeals is not final, under section 6 of the act, is disclosed by subsequent proceedings in the record. In this case if the doctrine of the Mining Company v. Turck prevails, there could be no writ of error or appeal to this court, and yet the statute of 1891, in its terms and provisions, makes no such distinction, and as far as we can see there is no such distinction, and no reason for such distinction.

But, again, if the present case is one which falls strictly within the principle of Mining Company v. Turck, and kindred cases, then it is to be remembered that all these cases are based to a great extent on the doctrine that the act of 1891 was not intended to give a party, defeated in the Circuit Court, the right to have his case determined upon its merits both in this court and in the Circuit Court of Appeals.

In the case at bar, the plaintiff in error has had no trial on

the merits, either in the Circuit Court of Appeals or in this court. In fact he has had no trial on the merits in any court. It is true the trial in the Circuit Court may technically be called a trial on the merits, but the record discloses, that the judge erroneously (as we insist) deprived the plaintiff in error of his right to a trial by jury, under the form of a peremptory charge. While judges of the Circuit Courts of the United States are authorized to give peremptory charges, yet it is a power which should not often be exercised. As Mr. Justice Harlan said in Travelers Ins. Co. v. Randolph, 78 Fed. 764, "A peremptory instruction should not be given to the jury, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking such instruction; and a case cannot be properly withdrawn from the jury because in the judgment of the court there is a preponderance of evidence in favor of the party asking the instruction." The Constitution of the United States, as well as the States, recognize the right to trial by jury as one of the most sacred belonging to the citizens of this country. The Circuit Court of Appeals dismissed the writ of error, taken by plaintiff in error, to that court upon a technicality, and, as we also insist, erroneously. Thus it is, although there is a Federal question in this case which appears in the record, if the present writ of error is dismissed the plaintiff in error will have been denied all right of review, both in this court and in the Circuit Court of Appeals. But apart from the views presented above, we insist, this case belongs to the class of cases illustrated by the Northern Pacific Railroad Company v. Amato, and the Union Pacific Railway Company v. Harris, heretofore cited. In both of those cases the declarations or complaints alleged diverse citizenship. The Federal question involved, apart from diverse citizenship, was that the defendants were corporations under the laws of the United States.

It was held, as heretofore explained, that this Federal question was not embraced in section 5 of the act of 1891 and was not one, as to which the judgment or decision of the Circuit Court of Appeals was final under section 6 of the act of 1891.

In the present case the Federal question, apart from diverse citizenship, is, that the parties hold under grants from different States. Section 5 of the act of 1891 provides for an appeal or writ of error direct to this court in cases that involve the construction or application of the Constitution of the United States. If these terms are given their widest meaning, then they will embrace all the other classes of cases enumerated in section 5. For instance—the next class of cases referred to in said section is, where "the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question." This class of cases involves the construction of the Constitution of the United States, and arises under the Constitution of the United States. So too, the next class of cases, viz.: cases in which the Constitution, or law of a State, is claimed to be in contravention of the Constitution of the United States, involve the construction and application of the Constitution. The Constitution and application of the Constitution of the United States broadly construed embraces every ground of Federal jurisdiction, including diverse citizenship, questions arising under the laws of the United States, and treaties of the United States, and the acts and doings of its officers in enforcing its laws and treaties, in fact all Federal questions. A corporation chartered under the laws of the United States ultimately, and finally, rests its right of corporate existence upon the Constitution of the United States. In the two cases last cited, however, this special provision of section 5 of the act of 1891 was held not to embrace the cases arising under the laws of the United States, which did not involve the question as to whether said laws were constitu-

tional. Thus, it seems, upon a familiar principle that the enumeration of six particular classes of cases is a limitation upon the scope and effect of each particular class.

"The construction or application of the Constitution of the United States" as used in section 5 of this act does not embrace cases which simply arise under the laws of the United States—that is, cases where the rights of one of the parties depend for their existence and validity upon the laws of the United States.

Northern Pacific R. R. Co. v. Amato.

Union Pacific Railway Co. v. Harris.

It does not embrace cases in which the constitutionality of a law of the United States is involved, because cases of this kind are provided for in the next clause of said section 5.

It does not embrace the validity and construction of any treaty of the United States, because cases of this kind are also provided for in the next clause of said section.

It does not embrace cases in which the Constitution or a law of a State is claimed to be in contravention of the Constitution of the United States, because these cases are provided for in the last clause of said section.

It does not embrace questions involving the jurisdiction of the Circuit Court, nor prize cases, nor cases of a capital or other infamous crime, because all these cases are provided for in the first three clauses of said section 5.

It does not embrace cases of diverse citizenship, nor cases between citizens of the United States and aliens, nor patent cases, nor revenue cases, in which the United States is a party, nor criminal cases involving a crime less than capital or infamous, nor admiralty cases, for all these cases are provided for in section 6 of said act.

The Constitution of the United States gives the courts of the United States jurisdiction in cases between citizens of

different States, and between citizens of the same State, claiming lands under grants from different States.

If "the construction or application of the Constitution of the United States," as used in section 5 of the act of 1891, does not embrace cases between citizens of different States, upon what ground can it be said to embrace cases between citizens of the same State claiming under grants of different States.

The record shows that the issue as to boundary and the issue as to grants from the different States were plainly made. The record does not show that there was any dispute about the application of the Constitution, or any dispute or controversy over whether the Constitution applied, or what construction was to be placed on the Constitution. It therefore does not involve the construction or application of the Constitution, and so does not fall within the purview of section 5.

Cornell v. Green, 163 U. S. 75, cited in 184 U. S. 295.

Now, probably, there is no clause of the Federal Constitution, and no law passed by Congress, which so little involves the construction and application of the Constitution as the particular provisions relied on by plaintiff in error. Parties claiming under grants from different States are allowed to come into the Federal Court in order to obtain an impartial trial. The question as to the validity of the grants we may say never depended upon any construction of the Constitution of the United States. Hence it is, we insist, that not being enumerated specifically in section 5 of the act of 1891, cases of parties claiming under grants of different States are not embraced therein, nor are they embraced in the classes of cases enumerated in section 6 of the act of 1891, in which the judgment and decree of the Circuit Court of Appeals is final. If we are right in this the result is that the writ of error should be maintained, it being sufficient under the case of

Loeb v. Columbia Township Trustees that the question appears definitely elsewhere in the record.

II.

It is next insisted by defendant in error, that inasmuch as the plaintiff in error claims under tax deeds from the State of Arkansas, this is not a case of parties claiming under grants from different States. The record discloses that the defendant in error claims under grants from the State of Tennessee (R. 13, 15, 30), and that the plaintiff in error claims under tax deeds made by the State of Arkansas through its proper officials. (R. 145, 149, 152.)

The plaintiff in error's titles run back to patents of the United States issued while Arkansas was a territory. (R. 230, 232.) By all the authorities, patents or grants are in substance nothing more than deeds. Each is a method of conveying titles to lands. Grants and patents are terms descriptive of conveyances of public lands by governments. Deeds commonly refer to conveyances by individuals.

In Pawlett v. Clark, 9 Cranch 293, the plaintiff claimed under a grant from the State of Vermont, and the defendants claimed under a grant from the State of New Hampshire, made at the time when the latter State comprehended the whole territory of the former State. It was argued that the grant under which the defendants claimed was not a grant of a different State, within the meaning of the Constitution, because Vermont at the time of its emanation was not a distinct government, but was included in the same sovereignty as New Hampshire. The court held that there was nothing in the objection, because the Constitution intended to secure an impartial tribunal for the decision of such questions, and it supposed that a State tribunal might not stand indifferent

in a controversy where the claims of its own sovereignty were in conflict with those of another sovereignty, and it had no reference whatsoever to the antecedent situation of the territory whether included in one sovereignty or another. See to same effect,

Colson v. Lewis, 2 Wheaton 377.

So it is manifest that if a State court would not be indifferent where its sovereignty has conveyed by grant, it would hardly be indifferent if the conveyance were by a tax deed. There would be as much motive for sustaining the one as the other.

III.

It is next insisted for the defendant in error that, in order to come within this provision of the Constitution, both requisites—concurrent citizenship, and the cause of action specified—that is, the claiming under grants of different States, must be presented. We submit, however, it is clear that the Constitution did not mean to exclude any cases of conflict of titles from different States from the jurisdiction of the United States courts. It is evident that it was regarded as making provisions for all cases where conflicting grants come into question, though a literal construction would perhaps hold otherwise. It would seem that the Constitution regarded every case as provided for, when it gave jurisdiction dependent upon personal citizenship of all cases, and jurisdiction dependent upon subject matter, even though the personal reason did not exist; but it can not reasonably be supposed that the instrument was intended to exclude any right dependent upon the subject matter, because the same result as to citizenship of different States was attained by the personal provision. Such a contention would eliminate from the field of Federal jurisdiction every ground set forth in the Constitu-

tion (excepting diverse citizenship), if these grounds existed concurrently with diverse citizenship. To illustrate—if one litigant claims title under a State law, and the other insists that said law was in conflict with the Constitution of the United States, and they were citizens of different States, could it be said, that because the jurisdiction of the United States might be invoked on the ground of diverse citizenship the other ground of jurisdiction was eliminated and destroyed? In substance, it must have been intended to cover all cases—the one by the personal clause, the other by the clause controlled by the subject matter. It would seem, therefore, that if the conflict of grants appeared without any allegation as to citizenship, the court would take the jurisdiction as established, on the ground of subject matter. However this may be, it is clear, that such a case would manifestly be within every reason on which the Constitution can be supposed to proceed. It can not be that it was intended to give citizens of the same State preference over non-citizens: a personal privilege in this particular case, when it was in the same sentence conferring a personal privilege on grounds diametrically opposite. Probably this did cover every possible case up to the time the peculiar provision of the Court of Appeals statute came into existence, which in this case gives it a phase, or presentation, that could not possibly have been considered when these clauses were adopted. Here, the case made as to subject matter, co-exists with the case made by reason of personal privilege—that is, the question of grants of different States co-exists with the jurisdiction as a personal privilege of the favored class—non-citizens—the class to be protected from the bias of the local courts. But here the jurisdiction *strictissmi juris* is obtained solely on the personal privilege of diverse citizenship, yet the other exists and forms an element entitled to greater weight than the personal privilege, in that it is granted by the Constitution and the act of 1888, 25th

Statutes at Large, page 433, to a class from which the personal privilege is withheld—that is, to citizens of the same State. In other words, it was not intended to give to citizens of the same State (in the precise state of facts which exist here) a writ of error without any restrictions, and to citizens of different States a like right only on special application and order. There would seem to be no reason why citizens of the same State claiming under grants from different States should be entitled to an appeal or writ of error as a matter of right, while citizens of different States claiming under grants from different States should be denied that right. The ground of jurisdiction on account of titles claimed under different States is one of higher dignity than the ground of citizenship of different States. It is a quasi-interstate question. When the States are parties it is an interstate question for active relief by original bill in this court; when it comes up between citizens the tendency and purpose of the jurisdiction is to prevent a conflict between the States, by providing the same final arbiter on writ of error as where the States are directly parties. This idea is recognized in the Court of Appeals act in the distinction between cases in which the jurisdiction depends on diverse citizenship entirely, and in cases of titles emanating from different States. In the one case the judgment or decree of the court is final, in the other it is not. The provision in the Constitution really means controversies between citizens of different States and controversies between persons claiming under grants from different States, *even though* they be citizens of the same State. Aside from the jurisdiction naturally belonging to the United States as a government, in cases arising under its Constitution, laws and treaties, there are three gradations in the incidental jurisdiction. First, original jurisdiction in the Supreme Court of the United States of questions between the States and questions affecting embassadors, ministers, consuls, etc. Second,

appellate jurisdiction of questions involving titles under different States. Third, jurisdiction of citizens of different States. The second ground of jurisdiction is given, not because of the citizenship in the same State, but in spite of it.

We insist that the Constitution of the United States on this point should be construed as though it read, the judicial power shall extend to "controversies between citizens of different States and between parties claiming lands under grants of different States, *even though* they be citizens of the same State;" and we insist that it was never the intention of the framers of the Constitution, or of Congress, to make any discrimination or difference as to the rights of parties claiming lands under grants of different States, because in one case they might be citizens of the same State, and in the other citizens of different States, and we submit the proposition that if a record in the Federal court discloses simply the fact that the parties are claiming under grants from different States the jurisdiction would be sustained, even though the record is entirely silent as to the citizenship of the parties. In other words, we insist that in order to sustain the jurisdiction on the ground that the parties are claiming under grants from different States, it is not necessary to allege affirmatively, or to make it appear affirmatively, that the parties are citizens of the same State. What would be done where a citizen of a territory or of the District of Columbia and a citizen of one of the States claimed land under grants from different States?

In the case of Pope v. The Railroad Company, 173 U. S. 573, it is said, "Diversity of citizenship confers jurisdiction, irrespective of the cause of action. But if the cause of action arises under the Constitution, or laws, or treaties of the United States, then the jurisdiction of the Circuit Court may be maintained irrespective of citizenship."

IV.

It is next insisted that Congress has not conferred original jurisdiction on any Federal court of controversies involving grants of lands by different States to citizens of the same State, and that therefore no suit can be brought in a Federal court originally on this ground.

This proposition is answered by the case of Pawlett v. Clark, 9 Cranch, cited above. That case was instituted originally in the Circuit Court of the United States.

THOS. B. TURLEY,
J. B. HEISKELL,
Attorneys for Plaintiff in Error.

Office Supreme Court U.S.
FILED
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No. 89.

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Supreme Court of the United States

OCTOBER TERM, 1902.

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No. 89.

E. M. AYRES, PLAINTIFF IN ERROR,

v.

JOHN H. POLSDORFER AND WIFE.

ARGUMENT OF J. B. HEISKELL FOR AYRES.

Is this a case where the question is one of the application of the construction of the Constitution under section 5? The question of fact is the one that is material to the decision of the case. Does this land lie in Arkansas or Tennessee? Is the title derived from Arkansas or the title derived from Tennessee paramount? This is the question on which the title turns. If the land lies in Arkansas, there is no question about the *application* of the Constitution. It is not insisted here and was not below that there was any question about whether the statute would apply—all parties were agreed about the point of law that if the land lay in Arkan-

sas the grant of Tennessee was of no avail—there was no question whether the statute and the Constitution applied. The question was upon the facts, *i. e.*, upon matter that did not involve any doubt or question as to application or construction, yet which undoubtedly involved a matter distinctly of Federal cognizance, as involving the policy of settling in the Federal courts the boundary between States, whether arising in a direct issue between the States as parties or incidentally between private parties.

Cornell *v.* Green, 163 U. S., 75.

Let us consider the purpose and aim of this clause. The word *jurisdiction* may be used for the purpose of making essential the mode of obtaining the right to try, or it may be used for the purpose more important, in view of this statute, of designating the subject-matter of the suit. In and of itself, the mode or cause of jurisdiction below is immaterial, so that it is effectual to bring the case into the circuit court. It is as well there, as secure of its standing in that court if brought there for diverse citizenship, as if it involves a construction of the most difficult and important question that could arise under the Constitution. Therefore it would seem impossible that the law intends to make the immaterial consideration of the ground of jurisdiction—*qua* ground of jurisdiction—all grounds of jurisdiction as basis of a right to resort to the particular court being equally effective—control the right to further review in the Supreme Court. It must then have had some ulterior view in which this description of a class of cases did designate or was sup-

posed to designate a character of case necessarily involving something other than the bias of a State court in favor of its own citizen and against the citizen of another State. Now, diverse citizenship is evidently ground of jurisdiction that claims but little favor when it stands alone, as the ground upon which the court is called to grant any favor or protection other than to substitute itself for the State court, as good as any as a cause to take jurisdiction, but not as indicating a question involved of a character to justify appeal. It follows that the law does not intend to make that which is immaterial to the validity of the *locus standi* a test of the right to a writ of error, but that it is the ulterior purpose of excluding cases involving no other question more important of itself than that of residence or citizenship; therefore the word "entirely." But if any cause of jurisdiction exists in the case which does not, cannot fortify the parties' position, standing in court—for it cannot be more perfectly secure by any extraneous aid than perfectly secure by diverse citizenship—then if that other ground justifies a writ of error of right, it must be because it *must* involve something else—some question more favored as a cause for review than the questions which a case depending on diverse citizenship must give rise to. It must be because any ground but that exclusively must involve a question of necessity more cogent as a ground for review.

If this view is correct and the subject-matter involved in the suit is the cause, why the cases are distinguished, and one is subject to writ of error of right and the other not, it necessarily results that the plaintiff cannot restrict the defendant's right of review by electing to set up one cause of jurisdiction instead of another, or of both; but as the sub-

stantive and effectual reason for the right to review is the *matter* to be considered, its existence is the important and controlling thing, and not the manner in which its existence is shown, if it *sufficiently* appears by the *record*.

Loeb *v.* Col. Sp. Trustees, 179 U. S., 473:

When a question is made whether the plaintiff has a case in which the circuit court can take jurisdiction, it is not unreasonable to require that he show in his declaration his title to sue in that court; but when the question is upon the right of the defendant to a review, it is hardly consistent with reason to require him to show his right by the allegations of his adversary, the plaintiff. All that can be required of him would seem to be that he make it appear by the record.

The Constitution, article 3, section 2, provides that the courts of the United States shall have jurisdiction of cases "between citizens of different States and between citizens of the *same* State claiming lands under grants from different States."

Now, it is clear that the Constitution did not mean to exclude any cases of conflict of grants of different States from the jurisdiction of the United States courts.

It is evident that it was intended to make and was regarded as making provision for all cases where conflicting grants come in question. It would seem that the Constitution regarded every case as being provided for, when it gave jurisdiction dependent upon personal citizenship of all cases, and jurisdiction dependent on subject-matter, even though the personal reason did not exist; but it cannot reasonably

be supposed that that instrument was intended to exclude any right dependent upon the subject-matter, because the same result as to citizens of different States was attained by the personal provision.

In substance it must have been intended to cover and must have covered all cases—the one by the personal clause, the other by the clause controlled by the subject-matter. It would seem, therefore, that if the conflicts of grants appeared without any allegation as to citizenship, the court would take the jurisdiction as established on the ground of subject-matter.

However this may be, it is clear that such a case would manifestly be within every reason on which the Constitution or the statute can be supposed to proceed. It cannot be that it was intended to give citizens of the same State any preference over non-citizens, or, in other words, to give a special personal privilege in this particular case to citizens of the same State when it was in the same sentence conferring a preferential personal privilege on grounds diametrically opposite, *i. e.*, citizenship of different States.

Probably these provisions did cover every possible case up to the peculiar provision of the Court of Appeals Statute, which in this case gives it a phase of presentation not within the possible contemplation of the draftsmen of the Constitution, when adopted.

In the case at bar the subject-matter coexists with the personal-privilege jurisdiction; that is, the question of grants of different States coexists with the jurisdiction as a personal privilege to the favored class—the class to be protected from the bias of the local State courts.

But here the jurisdiction in the court below is obtained solely on the personal privilege of diverse citizenship; yet the other matter exists (and the jurisdiction here depends on it) and forms an element entitled to greater weight as a ground for review than the personal privilege, in that it is granted to a class from which the personal privilege is withheld; it is granted for a more controlling reason, but is intended to be granted to both citizens and non-citizens, one under the form and name of personal privilege, to the other under the name of a ground of jurisdiction, but it cannot be supposed that it was intended in any case to deny it to either. The words of the Constitution give it to both, severally in form but with the same intent.

Has the statute restricted the writ of error as of right in such case, where the jurisdiction is dependent on the subject-matter, and required the case where it depends on citizenship to be submitted to the discretion of the court on motion for certiorari? Has it required that order for review only as to the more favored class of suitors, thus discriminating further against the favored class? That cannot have been intended.

The statute certainly has given to citizens of the same State, in the precise state of facts which exists here, except as to citizenship, a writ of error without any restriction; that is, if this suit was between citizens of the same State, brought into the Federal court upon the ground that it involved conflict of grants, it would certainly entitle the parties to the writ of error of right and absolutely. To citizens of different States does it give a like right only on special application and order for certiorari? It would seem not.

But if we are wrong in this view, yet in the exercise of

that discretion which the court unquestionably has, we respectfully insist that the element of subject-matter as a ground of jurisdiction ought to be controlling; and that within the reason and policy of the Constitution, and within the reason and policy of the statute, as being a matter more important than the personal privilege of non-citizens, it entitles us to the certiorari

In other words, if the court can in the exercise of its discretion carry out the plain policy of the statute and Constitution as to conflict of grants of different States, it should so exercise that discretion as to give to the discretionary remedy by certiorari the same effect as if the coexisting cause of subject-matter was the ground and the peremptory writ of error could on that ground be invoked in a suit between citizens of the same State.

Take another view. There exists in this case two grounds of jurisdiction. The plaintiff below had the right to bring the suit there under one, and it being sufficient the court takes jurisdiction. But the other exists, though not stated by the plaintiff. The defendant is not precluded by plaintiff's failure to state it.

Is this a *petitio a principii?*

It assumes that the Constitution, properly construed, means to give the jurisdiction where the citizenship is different as well as where it is the same. It does give it to the non-citizen in a form which includes much more. I insist, then, that the statute intends to designate a class of *cases* as a means of comprehending in a brief and compendious phrase a class of *subjects* which do not rise in dignity and importance as a ground of review above the grade of the personal privilege of diverse citizenship cases and to exclude

them from the review as of right. Diverse citizenship does not of itself *necessarily* bring into a case any special question or class of questions. It may cover any humdrum lawsuit on a note of hand or for an assault—it may involve anything—but not of *necessity* anything of national importance or fit for review in a Federal Supreme Court. It is therefore intended to exclude from review in this court these humdrum cases, but to leave included in the class of cases for review here of right those in which there is an element of jurisdiction of a grade and dignity above that of diverse citizenship—any case, in other words, in which a Federal question or a question necessarily of Federal jurisdiction is involved—but leaving it to the discretion of the court to take jurisdiction by certiorari of such cases even involving State law only as from their exceptional importance in the principles involved—perhaps even where stupendous interests or amounts are involved, as to impress the court as justifying their revision. Every other ground of jurisdiction but adverse citizenship involves federal questions or this quasi-interstate matter—of Federal jurisdiction. The leading idea of the statute, therefore, is not jurisdiction of the case in the court of first instance as jurisdiction, but as describing a class of things. It might have been said in the same section, "all cases within the jurisdiction of the admiralty courts," and this would have described a class in similar manner to that we are considering; but using that phraseology would involve no question of whether the court of original jurisdiction had properly obtained the jurisdiction of the case on trial or how it appeared. It would only involve the question whether it was one of the designated class. So here

the evident intent of the statute is to attain the same object. It is not so clearly expressed, but it does clearly admit of that construction. That is the only construction which attributes a wise purpose to this provision, and the considerations we have urged not only justify, but demand that construction. It strikes at substance—makes that the goal—does not stick in the bark, but seeks the heart of the matter, and finds it. *Bona judicis est ampliare jurisdictione.*

J. B. HEISKELL,
For Plaintiff in Error.

No. 89.

By. of Randolph & Randolph & Co.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

E. M. AYRES, Plaintiff in Error,

vs. No. 310.

JOHN H. POLSDORFER AND WIFE, Defendants in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE DEFENDANTS IN ERROR ON MOTION TO DISMISS AND TO AFFIRM.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Attorneys for Defendants in Error.

PAUL & DOUGLASS, PRINTERS

Supreme Court of the United States.

OCTOBER TERM, 1902.

MOTION.

And now come the defendants in error, and move the Court to dismiss the writ of error herein, for the following reason:

Because the jurisdiction of the United States Circuit Court was originally invoked solely on the ground that the parties to the suit were citizens of different States, and as the decision of the Circuit Court of Appeals in all such cases is made final by statute, no writ of error can be sued out to bring such a case from the Circuit Court of Appeals to this Court.

And the defendants in error move the Court further, to affirm the judgment of the Circuit Court of Appeals for the following reason: Because the only question that could be considered by this Court, if the case was properly before it, is whether the judgment of the Circuit Court of Appeals in dismissing the writ of error to the Circuit Court below on the motion of the defendants in error was erroneous, and as the record clearly shows that such judgment was entirely correct, the same should be affirmed.

STATEMENT OF FACTS.

This is a real action under the statute of the State of Tennessee, brought by John H. Polsdorfer and Louisa M. Polsdorfer, his wife, as owners in possession, against E. M.

Ayres, Joe C. Marley, Thos. Price, E. J. Roy, T. A. Roy and L. R. Coleman, unlawfully setting up title to, and exercising acts of ownership over the land, October 15, 1898, in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

The declaration alleges:

"The plaintiffs, who are citizens of the State of Indiana, residing at Evansville, therein, complain of the defendants, Joe C. Marley, Thos. Price, E. J. Roy, T. A. Roy, L. R. Coleman and E. M. Ayres, who are citizens of the State of Tennessee, residing in the Western Division of the Western District thereof, in an action of trespass and ejectment.

"For that heretofore, to-wit: On October 1, 1898, the plaintiffs were lawfully entitled in fee and were in possession of the following described property situated in the County of Lauderdale, in the said District, to-wit: 2,150 acres of land in the said county situated in the low lands of the Mississippi river above Fort Pillow and north of Cole Creek, bounded as follows, to-wit:

(Then follows a description by metes and bounds of the first tract of land.)

"And also the following described land lying in the said County of Lauderdale, in the Mississippi river bottom above Fort Pillow and north of Cole Creek, and bounded as follows, to-wit:

(Then follows a description by metes and bounds of the second tract.)

"And also the following tract of land situated in the said County of Lauderdale, the same being an alleged island in the Mississippi river, and the south end of said alleged island is near to and about north or perhaps west of north of L. R. Coleman's warehouse at Fort Pillow, in said county, and some hundreds of yards distant from the

same, estimated to be from 300 to 500 yards distant, and bounded as follows:

(Then follows a description by metes and bounds of the third tract.)

The declaration then continues:

"All of the said property is of the value of exceeding $3,000.00. And the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to-wit: On the said October 1, 1898, at the said County of Lauderdale, unlawfully, and without right, entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do.

"Wherefore the plaintiffs have been injured and damaged to the amount of $3,000.00, and they bring their suit for the recovery of the said lands and the said damages." (R., pp. 2-4.)

The defendant, Joe C. Marley, filed a disclaimer, and on this the suit was dismissed as to him. (R., p. 6.) L. R. Coleman filed no pleas, nor made his appearance in any way.

The defendant, Thos. Price, filed the following pleas: "And now the defendant, Thomas Price, for plea comes and says he is not guilty of wrongfully withholding the premises from plaintiffs, which they claim in their declaration in this suit."

"And for further plea, defendant, Thos. Price, comes and pleads he is not guilty of cutting and removing any timber from the lands of plaintiffs, as they have alleged in

their declaration." (R., pp. 5-6.) E. J. and T. A. Roy filed similar pleas. (R., p. 5.)

The defendant, E. M. Ayres, filed the following pleas: "(1) And now comes the defendant, E. M. Ayres, and for plea says he is not guilty of the matter in plaintiffs' declaration alleged.

"(2) And for further plea the defendant says that plaintiffs' action accrued more than seven years before suit brought." (R., p. 7.)

On all the above pleas plaintiffs joined issue. The case went to trial, and resulted in a verdict for plaintiffs for certain tracts of land described therein against E. M. Ayres and Thos. Price. No land was recovered from E. J. and T. A. Roy. (R., pp. 8-12.)

The defendant, E. M. Ayres, applied for and obtained a writ of error from the Circuit Court of Appeals for the Sixth Circuit, assigning numerous errors not necessary to be mentioned here. The writ of error was obtained without any severance as to Thos. Price, and without anything appearing in the record showing notice to him, or that he was summoned to appear in the Circuit Court of Appeals. (R., pp. 273-278.)

In that Court the defendants in error (the plaintiffs below), filed a motion to dismiss the writ of error: "Because the defendant, Thos. Price, against whom there is a joint judgment with plaintiff in error, E. M. Ayres, has not joined in said writ of error, and no reason is shown in the record for his not doing so, nor does the record show that any request was made of him to join, or refusal on his part to do so." (R., pp. 279-280.)

The cause was later heard in the Circuit Court of Appeals, and on December 4, 1900, the writ of error was dismissed in pursuance to the motion. (R., pp. 281-282.)

A petition for rehearing was filed during the term,

which was denied February 23, 1901 (R., pp. 290-297), and thereupon a writ of error to the United States Supreme Court was applied for by E. M. Ayres and allowed by one of the Justices of this Court. (R., pp. 298-300.)

(The opinion of the Circuit Court of Appeals is in the record at pp. 283-289, and will be found also in 105 Federal Reporter, p. 737.)

BRIEF.

ON MOTION TO DISMISS.

(1)

By the Act of March 3, 1891, to establish the Circuit Courts of Appeal, it is provided that "the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States, etc." (Supp. Rev. Stat. of U. S., Vol. 1 (2d Edn.), Sec. 6, p. 903.)

When the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset from the declaration or the bill of the party suing, that the suit is of that character—in other words it must appear in that class of cases that the suit was one of which the Circuit Court, at the time its jurisdiction was invoked, could properly take cognizance.

Metcalf vs. Watertown, 128 U. S., 507.
Mining Co. vs. Turck, 150 U. S., 143.
Borzmeyer vs. Idler, 159 U. S., 412.
Railway Co. vs. Lewis, 173 U. S., 457.
Pope vs. R. R. Co., 173 U. S., 578.
Muse vs. Hotel Co., 168 U. S., 436.
R. R. Co. vs. Bell, 176 U. S., 325, and cases there cited.

The declaration in the present case invoked the jurisdiction of the Circuit Court below solely on the ground of diverse citizenship—that the plaintiffs were citizens of the State of Indiana, and that all the defendants were citizens of the State of Tennessee. It did not appear therefrom that jurisdiction was rested, or could be asserted on any other ground. Therefore the judgment of the Circuit Court of Appeals was final.

Mining Co. vs. Turck, Supra.
Borzmeyer vs. Idler, Supra.
Railway Co. vs. Lewis, Supra.
Pope vs. R. R. Co., Supra.
R. R. Co. vs. Bell, Supra.
Huguley, etc., Co. vs. Galeton, 184 U. S., 291.
Pub. Co. vs. Monroe, 164 U. S., 111.
Construction Co. vs. R. R., 148 U. S., 372.
Benjamin vs. New Orleans, 169 U. S., 161.
Rouse vs. Getcher, 156 U. S., 47.
Rouse vs. Hornsby, 161 U. S., 588.
Refining Co. vs. New Orleans, 181 U. S., 281.
Robinson vs. Caldwell, 165 U. S., 359.

(2)

The sole ground for suing out this writ of error, as stated in the petition therefor, was "that the record in this cause shows that petitioner claimed under muniments of

title from the State of Arkansas, and Polsdorfer and wife, and also Price, claimed under muniments of title from the State of Tennessee. In other words petitioneer claims that he has a right to the writ of error under the Constitution of the United States, Article 3, Section 2." (R., p. 300.)

In the case of Mining Co. vs. Turck, Supra., Mr. Chief Justice Fuller said:

"From Wiscart vs. D'Archy, 3 Dall. 321, to American Construction Co. vs. Jacksonville Railway Co., 148 U. S., 372, it has been held in an uninterrupted series of decisions that this Court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject."

150 U. S., 141.

It is provided in Section 4 of the Judiciary Act of March 3, 1891, that "all appeals by writ of error or otherwise, from said District Courts shall only be subject to review, in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States, or in the Circuit Court of Appeals hereby established according to the provisions of this act regulating the same."

Supp. to Rev. Stat. of the U. S., Vol. 1 (2d Edn.), p. 903.

The same Act, in Section 6, provides: "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

Id., p. 904.

In order to support this writ of error, plaintiff in er-

ror must show that the judgment of the Circuit Court of Appeals was not final and that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States. Plaintiff in error has attempted to do this by asserting that this is a controversy between citizens of the same State claiming lands under grants of different States, because in such cases the judgment of the Circuit Court of Appeals is not made final by statute.

Admitting for argument that such a question is raised on this record, the plaintiff in error, however, is not entitled to this writ of error. Nothing whatever is stated in the declaration about the parties to the suit claiming lands under grants of different States. The pleas are simply general pleas of "not guilty," and a plea of the Statute of Limitations. Issues were joined on the pleas, and the case was tried on the issues. On the trial Polsdorfer and wife deraigned title through W. W. Woodfolk, to whom the State of Tennessee granted a part of the land claimed by them. They also deraigned title through other grantees from the State of Tennessee. The defendant, Thos. Price, introduced certain grants from the State of Tennessee as evidence of his title, and the defendant, Ayres, introduced certain tax deeds made by officials of Mississippi county, Arkansas, as evidence of his title to the land. The first time it appeared in this record, how the parties claimed the land in controversy respectively, was when, on the trial, they introduced their evidence in support of their claims of title.

To maintain this writ of error on the ground that the parties claim under grants from different States, the Court will have to hold that this question may be raised by the evidence, and the effect of such ruling will be that on a claim of jurisdiction on that ground reference may be made

to the entire pleadings, the evidence and the rulings of the Court below. This view would ignore the settled doctrine that the inquiry into the jurisdiction of the Circuit Court is limited to the facts appearing on the record in the first instance. The error in the argument is manifest. The jurisdiction attached on the filing of the declaration and could not be affected by the subsequent developments. It depended entirely upon the diverse citizenship as it appeared in the record when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

Mining Co. vs. Turck, 150 U. S., 144.

See also cases first cited in brief.

(3)

Counsel is in error in assuming that his client is entitled to this writ of error on the ground set out in his petition. The article of the Constitution to which he refers expressly states that to give a Federal Court jurisdiction the persons must claim the land "under *grants* of different States." It is true that Polsdorfer's title goes back to the Woodfolk grant and other grants from the State of Tennessee (R., p. 13), and that Price claims title to the land by grants from the same State. (R., pp. 114-117.) Ayres set up no grant whatever—in fact he could not. He claimed that the land was in Arkansas, but the evidence he introduced to support this contention shows conclusively that the land he claimed was never granted by the State of Arkansas, or any other State. He introduced a book from the office of the Clerk of Mississippi County, Arkansas, showing the entries of fractional sections 17 and 18, by D. Hardiman, in 1836, and also showing the entry of fractional sections 19 and 20, by J. C. Barnes, in 1846—all said fractional sections being in Township 12 North, Range 12 East. (R., pp. 148 and 232.) This is the land claimed

by him, and it was in the Louisiana Purchase, and in the State of Arkansas. He also introduced patent No. 3750, of date February 1, 1843, by which the United States conveyed to D. Hardiman, and patent No. 4780, of date May 12, 1857, by which it conveyed to John C. Barnes the land entered by each. (R., pp. 230-232.)

Ayres does not deraign title back to these patents, for his title is far more recent, being purely a tax title. He claims the land through John A. Lovewell, who purchased it at a tax sale about 1884, for taxes due the State of Arkansas. The deed to Lovewell is of date July 22, 1884. (R., pp. 145-147.) The deed from Lovewell and wife to Ayres is of date August 2, 1884. (R., pp. 149-151.)

The only other deeds Ayres introduced in evidence are four tax deeds to him from H. D. Tomlinson, Clerk County Court, Mississippi county, Arkansas, and all of which are based on sales for taxes due the State of Arkansas and County of Mississippi.

It is manifest therefore that neither the State of Arkansas nor any other State ever had the title paramount to the land claimed by Ayres, and consequently no grant could have been made by the State of such land. Tax deeds are not *grants* from the State levying the taxes. This fact alone defeats his right to this writ of error on the ground he attempts to take advantage of. The most that can be said is that Ayres, as he states in his petition for this writ of error, "claims under *muniments of title* from the State of Arkansas." Such a claim does not meet the requirements of the Constitution, Article 3, Sec. 2. relied on by Ayres, as the portion of that Article referred to specifically calls for "grants," contemplating grants from the State as a sovereign, made in the exercise of its sovereign power, and professing to pass a title belonging to the State in that character.

The portion of Article 3, Sec. 2 of the Constitution relied on by plaintiff in error to support this writ of error, requires that in order to give the Federal Courts jurisdiction, in controversies involving lands claimed under grants of different States, there must be the additional qualification that the litigants are citizens of the *same* State. The reason of this restriction is plain. Previously in the same Article and Section, there is the broad provision that the jurisdiction of the Federal Courts extends to controversies "between citizens of different States."

Manifestly there was no necessity to make a special provision giving the Federal Courts jurisdiction in controversies between citizens of *different* States claiming lands under *grants* from different States, because in such cases such Courts acquire jurisdiction by virtue of the provision in regard to diverse citizenship without reference to the cause of action. (Pope vs. R. R., 173 U. S., 576.) The framers of the Constitution unquestionably recognized this fact and also recognized the additional fact that controversies would arise between citizens of the *same* State, claiming lands under grants from different States. In such cases the Federal Courts could not acquire jurisdiction under the provision in regard to diverse citizenship, because that requisite did not exist. Nevertheless, they realized that as the rights of the two States to grant the land must, in the absence of a special provision, be drawn into question in one of them, and neither of the two States ought to decide the controversy, that it was peculiarly a question for determination by the Federal judiciary. To meet such cases they inserted in the Constitution the provision above referred to, that in controversies "between citizens of the *same* State, claiming lands under grants of different States," the Federal Courts should have jurisdiction.

Now, to come within this provision so as to give the Federal Courts jurisdiction by virtue thereof, both requisites, concurrent citizenship, and the cause of action specified, must be present. In the case at bar, neither the specified cause of action (as we have shown above), nor concurrent citizenship as a matter of fact exists because Polsdorfer and wife are citizens of the State of Indiana, and all the persons sued by them are citizens of the State of Tennessee. Thus, it is clearly shown that the only ground on which the Circuit Court below acquired jurisdiction, whether tested by the record, or by the facts outside, was that of diverse citizenship, and hence we are brought back to our proposition argued first, that the writ of error must be dismissed because, in such cases, the judgment of the Circuit Court of Appeals is final.

(5)

Though Article 3, Section 2 of the Constitution prescribes to what cases the judicial power of the United States shall extend, it required an Act of Congress to create all Federal Courts, and to prescribe the jurisdiction of each Court. Congress in conferring jurisdiction on the Federal Courts, in controversies "between citizens of the same State claiming lands under grants of different States," has done so only in the following manner: "If in any action commenced in a State Court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may State to the Court, and * * *" Then follows what must be done by the litigagants in order to enable the Court to determine whether or not any of them claim under grants of different States:

"And if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as herinbefore mentioned in this Act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district."

Supp. Rev. Stat., Vol 1 (2d Edn.), p. 613.

Our first contention is, that as *Congress* has not conferred original jurisdiction on any Fedearl Court, of controversies involving grants of land by different States to citizens of the same State, no suit can be brought in a Federal Court originally on that ground. The only way a Federal Court can acquire original jurisdiction of a controversy on such ground is that prescribed in the Act quoted viz: by removal from the State Court where such suit was brought. Therefore, this suit having been brought originally in the Federal Court, Ayres is precluded from ever setting up in it as the ground of the jurisdiction of the Circuit Court, or as the basis of this writ of error that the controversy involves grants of lands by different States.

Polsdorfer had the right to present his case as he saw fit, which he did by his declaration. Ayres, if he wished to raise the question that he and Polsdorfer claimed under conflicting grants of different States, and present it in the first instance as a Federal question, could have done so by a separate suit in the State Court, setting up that fact, and then have proceeded in accordance with the Act above quoted, to have the case removed to the Circuit Court of the United States.

If we are wrong in the above contention, we then submit he could have pursued the course of bringing a separate suit in the Federal Court against Polsdorfer, on the ground of diverse citizenship, and have set up therein the

fact that he and Polsdorfer claimed the lands under grants of different States. He would then have had to raise the question in the manner set out in the Act of Congress, viz: by stating to the Court, or making affidavit of the grant he claimed and relied upon, and by producing such grant or an exemplification thereof, and by moving the Court to compel the adverse persons to inform the Court whether they claimed the land under a grant from another State. Perhaps he might have set up the defence of conflicting grants of different States by plea in the present case, but if this had been done, he would have had to pursue the same course just narrated.

See: Blackburn vs. Portland G. M. Co., 175 U. S., 571.

He, however, failed to follow any of the above courses, and simply filed his pleas herein of "not guilty," and the Statute of Limitations, and went to trial thereon. Consequently as the question was never raised at any point in the case the Circuit Court could not have considered it. Counsel for plaintiff in error seemed to realize this fact, for the question was argued by him in neither the Circuit Court nor the Circuit Court of Appeals. He is trying to have the question considered here by setting it up in his petition, for the purpose of sustaining his right to the writ of error in a last attempt to have the entire case (as appears from his brief) reviewed in the Supreme Court. This Court will not consider any writ of error, the grounds for which were not properly laid in the foundation of the suit. It is not sufficient to present the question for the first time in the petition for the writ of error. Then it is too late.

C., H. & D. R. R. Co. vs. Thibaud, 177 U. S., 619-620.

The fact is, plaintiff in error has mistaken his remedy. This case, if subject to review in this Court at all, could

have been reviewed only by certiorari, as provided in the Act of Congress and as appears from the decisions.

Sec. 6, Ch. 517, Act of March 30, 1891, Revised Statutes U. S., Vol. 1 (2d Edn.), p. 903.

Kingman vs. Mnfg. Co., 170 U. S., 675.

Construction Co. vs. R. R., 148 U. S., 372.

Carter vs. Roberts, 177 U. S., 500.

Robinson vs. Caldwell, 165 U. S., 362.

The words in the Act "by certiorari or otherwise" add nothing to the power of this Court, for if some other order or writ might be resorted to, it would be *ejusdem generis* with certiorari. The writ is the equivalent of an appeal or writ of error as declared by the Statute, and it is issued in the discretion of the Court.

Huguley, etc., Co. vs. Galeton, 184 U. S., 295.

But the time for seeking relief by that means has now expired.

The Conquerer, 166 U. S., 110, 114.

ON MOTION TO AFFIRM.

(1)

We will now assume for the sake of argument solely, that this is a case which could properly be taken to this Court by writ of error from the Circuit Court of Appeals, and that by virtue of the writ of error sued out by Ayres, it is properly in this Court.

The motion to dismiss in the Circuit Court of Appeals was submitted with the brief on the merits, but the Court did not consider the case on the merits, and dismissed the writ of error solely on the motion. (R., p. 282.) The prayer in the petition for the writ of error is "for a writ of error, to the end that the errors intervening in the decision of the said United States Circuit Court of Appeals, Sixth

Circuit, may be corrected." (R., p. 299.)

The errors assigned are that the Court erred in (1) dismissing the writ of error on the motion; (2) in dismissing the petition for rehearing; and (3) in refusing to entertain jurisdiction of the cause and not reversing it upon the merits. (R., pp. 299-300.)

The third ground of exception, as we will argue later, cannot be considered. The second ground, if the opinion of the Circuit Court of Appeals is correct, is not well taken, and need not be argued, for no facts were brought out in the petition for the rehearing not considered by the Court in disposing of the motion. This statement can be verified by simply reading that petition. Hence, the only ground of exception of any moment is the first, which presents the question referred to in the prayer of the petition, viz: whether there was error in the *decision* of the Circuit Court of Appeals.

The general rule is that the whole case is open for examination upon a writ of certiorari issued by this Court.

R. R. Co. vs. Napier, 166 U. S., 280.

This applies, however, (in the case of a writ of certiorari to a Court of Appeal) only to the entire case that was considered by that Court in reaching its judgment. The restriction is the same in cases before this Court on error to the Court of Appeals.

In the case of Refining Co. vs. New Orleans, the Circuit Court of Appeals dismissed the case (on writ of error to the lower court) for want of jurisdiction because one of the defences was the unconstitutionality of an ordinance of the City of New Orleans. The jurisdiction of the United States Circuit Court rested solely on the ground of the diverse citizenship of the litigants. A petition was filed in this Court praying for a writ of certiorari, requiring the United States Circuit Court of Appeals to certify the case

to this Court for its review and determination; or in the alternative for a writ of mandamus to command the judges of said Court to try the case.

Leave was granted to file the petition, and a rule to show cause was thereupon entered, to which due return was made. Though the record was before the Court on the rule, and full argument was made, the Court did not consider the case on the merits, but only the correctness of the judgment of the Court of Appeals, and after fully considering this feature, was of the opinion that the judgment of the Court of Appeals dismissing the cause on the motion was erroneous. The following judgment was then entered by this Court in the cause:

"Writ of certiorari to issue; return to rule to stand as return to writ; judgment thereupon reversed and cause remanded with a direction to take jurisdiction and dispose of the cause."

181 U. S., 283.

A similar judgment would be entered in the present case, if the Court has jurisdiction, and the judgment of the Court of Appeals, dismissing the writ of error on the motion is considered by this Court to have been erroneous.

Plaintiff in error having sued out a writ of error to the Circuit Court of Appeals, that Court must pass upon the merits of the case before this Court can do so. The Judiciary Act of 1891 does not give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals. After a judgment by the latter Court on the merits, its judgment stands, unless reviewed by certiorari to, or appeal from that Court, in accordance with said Act.

Robinson vs. Caldwell, 165 U. S., 359.

Carter vs. Roberts, 177 U. S., 496.

R. R. vs. Thiebaud, 177 U. S., 615.

Huguley, etc., Co. vs. Galeton, 184 U. S., 290.

The Circuit Court of Appeals was satisfied that the motion to dismiss was well taken, and had no hesitation in dismissing the writ of error. Hence this Court is limited simply to a review of the correctness of the decision of the Circuit Court of Appeals on the motion upon the facts as presented by the record. If this Court should find that the decision of the Circuit Court of Appeals was erroneous, it will remand the cause to that Court for a judgment on the merits.

Refining Co. vs. New Orleans, 181 U. S., 281.

(2)

The suit brought by Polsdorfer was a joint suit against all the defendants for all the land, and not against each defendant for a part of the land.

The judgment in the lower Court, after setting out the joint verdict against all the defendants, describing the land recovered by the plaintiffs from them jointly, adjudged that "the plaintiffs do have and recover of and from the defendants severally, the lands hereinbefore described, found by the verdict of the jury to belong to them in fee, * * * * *."

As stated above, no land was recovered from the defendants, E. J. Roy and T. A. Roy—they not claiming the land recovered. The suit was dismissed as to Marley, and Coleman made no appearance. As to the remaining defendants, Thomas Price and E. M. Ayres, manifestly, as appears from the record, the judgment for the land recovered was against both of them. In other words it was a joint judgment, in the sense of the law, against Thomas Price and E. M. Ayres; that is, an entire judgment against each of them for all the land.

See: Humes vs. Bank, 54 Fed. Rep., p. 917.
Masterson vs. Herndon, 10 Wall., p. 416.
Hedges vs. Seibert, 50 Fed. Rep., p. 643.
Hampton vs. Rouse, 13 Wall., p. 187.

It appears from the record that the writ of error was sued out by E. M. Ayres alone, and although the judgment was obtained for all the land against him and his co-defendant, Thomas Price, no mention at all is made in Ayres' petition for the writ of error, or in the writ of error, of Thomas Price, or that he refused to join in the writ of error, or that he knew anything at all of the same being sued out.

It is the established doctrine of the Federal Courts that in cases at law where the judgment is joint, all the parties against whom it is rendered must join in the writ of error, and in Chancery cases all the parties against whom a joint decree is rendered must join in the appeal, or the writ of error or appeal will be dismissed.

See: Masterson vs. Herndon, Supra.
Hardee vs. Wilson, 146 U. S., p. 179.
Downing vs. McCartney, 131 U. S., App., p. 98.
R. R. Co. vs. Evans, 175 U. S., p. 723 (A).
Mussina vs. Cavazos, 20 How., p. 289.
Feibelman vs. Packard, 108 U. S., p. 14.
Simpson vs. Greely, 20 Wall., p. 152.
Davenport vs. Fletcher, 16 How., p. 142.
Smyth vs. Strader, 12 How., p. 327.
Trust Co. vs. Gas Co., 95 Fed. Rep., 49.
Estis vs. Traube, 128 U. S., 225.
Trust Co. vs. R. R., 58 Fed. Rep., 6.

We submit the judgment obtained by defendant in error, being a judgment for all the land recovered against Thomas Price and E. M. Ayres, and Ayres alone suing out the writ of error, that under the authorities just cited, this was sufficient to sustain the motion for the dismissal of

the writ of error, as the Court of Appeals had no jurisdiction in the matter.

The rule was established to provide for just such cases as the one at bar.

In the first place all joint defendants against whom a judgment is rendered—that is, all having a right to question the entire judgment—should be made to join in a writ of error, or appeal, so that the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. And, second, in order that the joint defendants may be estopped from litigating the same questions again, and thus force the appellate tribunal to decide a second or third time the same question on the same record.

If it were not for this rule, after the determination of this writ of error, sued out by Ayres, there would have been nothing at all, unless it was the statute limiting the suing out of a writ of error, restraining Price, his co-defendant, from litigating the same questions at another term of the Court, if he so desired. This is what the Federal Courts, in making the above rule, have attempted to avoid. Those Courts have gone even further in providing for the contingency where a joint defendant refuses to join in a writ of error or appeal. In such cases it is the rule that the defendant who wishes to prosecute the writ of error or appeal has a remedy against his co-defendant who refuses to join in the same, known technically as the remedy by summons and severance. It is a remedy allowed where more than one person are interested jointly in a cause of action, and one of them refuses to proceed in the legal assertion of the joint rights involved in the matter. In such cases, the other party issues a writ of summons by which the one who refuses to proceed is brought before the Court, and if he still refuses, an order or judgment of severance is made by the

Court whereby the party who wishes to do so can sue alone.

One of the effects of this judgment of severance is to bar the party who refuses to proceed from prosecuting the same writ or an appeal in another action.

The defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature.

There is nothing in the record, however, showing that the defendant, Price, refused to join in the writ of error, or that he knew anything of it.

But we insist that if Price had known of the writ, and had failed to join therein, that the writ of error of Ayres was nevertheless properly dismissed, on account of the fact that no notice was served on Price to join in it—there was no severance of the cause as to him.

We do not here confine ourselves to the technical mode of proceding by summons and severance.

No doubt the writ of error would have been good if it had appeared in the record in any way that Price had been notified, in writing, to appear, and that he had failed to appear, or if appearing, had refused to join.

There is, however, no such notice set out in the record, and there is even no allegation of the same in the petition of Ayres.

Before this writ of error could stand, it must unquestionably have appeared on the face of the record that there was a written notice, and that due service of the notice was made on the defendant, Price, or the record must show his appearance and refusal to join in the writ, and that the Court on that ground allowed the writ of error to Ayres, who alone applied for it, as to his own interest.

As this did not appear the writ of error was properly dismissed.

Masterson vs. Herndon, Supra.

Hardee vs. Wilson, Supra.
Inglehart vs. Stansbury, 151 U. S., p. 72.
Slipperly vs. Smith, 155 U. S., p. 86.
Williams vs. United States, 11 Wheaton, p. 414.
Owings vs. Kincannon, 7 Pet., p. 399.
Todd vs. Daniel, 16 Pet., p. 521.
Beardsley vs. Ry. Co., 158 U. S., p. 123.
Trust Co. vs. Clark, 83 Fed. Rep., p. 230.
Trust Co. vs. McClure, 78 Fed. Rep., p. 211.
Dodson vs. Fletcher, 78 Fed. Rep., p. 214.
Wilson vs. Insurance Co., 12 Pet., p. 140.

In the case of Short vs. The Columbia, 67 Fed. Rep., p. 944, the rule is laid down as follows: When an appeal is taken (and we have seen that both appeals and writs of error follow the same rule), it is essential to the jurisdiction of the Appellate Court, that each party, having a right to be heard upon a review of the case, should be brought before the Court, or lawfully estopped from continuing the litigation.

It is undeniable that defendant Price had rights that should have been heard on the writ of error, if he so desired, but if he did not wish these reviewed, then he should have been brought before the Court and put in a position to be lawfully estopped by law from continuing this litigation in the future, and, as this was not done, the Court had no jurisdiction to try the writ of error.

The facts in the record show that Price would have had the greatest interest in reversing the judgment, if it could have been done. Polsdorfer, in the lower Court, sued both Price and Ayres for certain tracts of land, not designating that any particular ground was claimed separately by either, but suing both for the whole, and both of them defended as to the whole, and the judgment rendered below was against Price and Ayres equally for the whole, no

specified body of land being designated to be recovered from each.

Price and Ayres were claiming the whole of the same ground as Polsdorfer and wife, each setting up respectively claims hostile to Polsdorfer, to the whole of the land sued for. These claims in the lower Court were adjudicated against the two, and Ayres alone sued out the writ of error to have the judgment of the lower Court reviewed in the Court of Appeals, *only* with respect to the controversy as between him and Polsdorfer and wife.

The record also shows that Price asserted a claim of title to all the land as positively as Ayres, and the judgment below was rendered against the two. Price had the right to question the judgment on error as to all the land, equally with Ayres. This being the case, Price undoubtedly should have been made a party to the writ of error, or have been put in a position to be estopped in the future from setting up an error, which, if it existed, should have been passed on and corrected finally upon the writ of error sued out by Ayres.

The case nearest in point to the one at bar is the case of Masterson vs. Herndon, cited above. This was a case where certain parties filed a bill of peace and for the conveyance of a pretended title to a tract of land described, against S. A. Maverick and J. H. Herndon. On that bill the Court decreed that the complainants "have and recover of the said S. A. Maverick and the said J. H. Herndon the tract of land in the bill described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by the said defendants."

From this decree Herndon appealed. In regard to Maverick, the petition was thus: "Your petitioner says that his co-defendant, Maverick, refuses to prosecute this

appeal with him." There is nothing of the kind in the petition here.

Comparing this case to the case at bar, we find they are virtually the same, though the case at bar is in substance an action of ejectment, and the other was a suit in equity for the conveyance of a pretended title. The judgments in both cases were joint judgments, in the sense that they concluded the rights of both the defendants, as appears on the face of each judgment.

The petition filed in the case at bar, as stated before, made no mention in any way, nor did it appear in the record that Price was notified of the writ of error having been sued out, or was consulted about it, or that he refused to join in the same.

This, then, is a stronger case even than that presented in the case of Masterson vs. Herndon. That case was before the Supreme Court on a motion to have the appeal dismissed, and Mr. Justice Miller, for the Court, after stating the facts as above set out, and after going into the case thoroughly, held that the motion was well taken, and the appeal should be dismissed.

The Court of Appeals had no jurisdiction to try this cause, and, if the motion had not been filed, that court would have, even on its own motion, dismissed the case.

Estis vs. Traube, 128 U. S., p. 226.

Also: Trust Co. vs. Longworth, 76 Fed. Rep., p. 609.

Trust Co. vs. Kilbourne, 76 Fed. Rep., p. 883.

Davis vs. Trust Co., 152 U. S., p. 590.

Gray vs. Havemeyer, 53 Fed. Rep., p. 174.

Dolan vs. Jennings, 139 U. S., p. 385.

Railroad Co. vs. Sweeney, 95 Fed Rep., p. 395.

In conclusion, as our answer to the brief of counsel for plaintiff in error in opposition to this motion, we beg to

quote from the opinion of the Court of Appeals, as the learned Judge delivering that opinion concisely demonstrates the insufficiency of every defense set up:

"It is earnestly insisted by counsel for the plaintiff in error that this case falls within the class of cases last mentioned, because it appears that Ayres and Price founded their claim to the land upon wholly distinct and antagonistic titles. But it was the land itself which was the subject of the suit, and the titles which each of these defendants advanced amounted to no more than separate means to a joint defense. Each of these means was also available to both defendants, for the plaintiff must recover upon the strength of his own title as against all others. The rule is that separate pleas and separate defenses, founded upon distinct sources of right, do not make the judgment several, when they are brought forward in defense of a single cause of action, upon whch the judgment is recovered."

See: R. R. Co. vs. Ide, 114 U. S., 52.

Pirie vs. Tvedt, 115 U. S., 41.

Merchants' &c. Co. vs. Ins. Co., 151 U. S., 383.

"The *res* is not thereby divided. In many of the cases already cited there was no unity of title between the parties bound by the judgment from which the appeal was taken—cases wherein the appeal was held ineffectual, because parties not joined had an interest in the question whether the judgment should stand or be reversed.

"Counsel for plaintiff in error further urges that before the objection was brought forward the time for taking a writ of error by Price had expired, and that therefore he is as effectually precluded as if he had originally been summoned and had refused to join, and further, that no right of the plaintiff has been delayed by his non-joinder. This answer is plausible, but it does not reach the root of the matter, which is treated as one of jurisdiction. This must

be tested by the conditions existing at the time when the writ was sued out. The action had not then been severed, and, for aught that then appeared, Price might also take out a writ. And it is clear that, if the present writ was ineffectual to remove the case, it could not be made valid by mere lapse of time and the coming on of subsequent conditions." Citing:

Mattox vs. U. S., 156 U. S., 237, 15 Sup. Ct., 337, 39 L. Ed., 409.

Wilson vs. Insurance Co., 12 Pet., 140, 9 L. Ed.,1032.

Estis vs. Traube, 128 U. S., 225, 9 Sup. Ct., 58, 32 L. Ed., 437.

Inglehart vs. Stansbury, 151 U. S., 68, 14 Sup. Ct., 237, 38 L. Ed., 76.

"The bill of exceptions was tendered by Ayres alone. The pleadings are in the statutory form, and the judgment simply responds to them. So far as we can see, no question could arise upon the record proper; and, as Price did not procure the settlement of a bill of exceptions in his behalf, there is perhaps some ground for saying that he was already disabled from prosecuting a writ of error, and that therefore a summons and severance would have been a futile performance. But, at the time when this writ of error was taken, Price, if he could not avail himself of the bill of exceptions which Ayres had procured to be settled, was not, so far as we know, debarred from procuring the settling of a bill in his own behalf, and joining in the writ of error and assigning errors thereon.

"Stress is also laid upon the fact that by the language of the judgment it is adjudged in terms 'that the plaintiffs do have and recover of and from the defendants severally,' etc. But we think it manifest that, in substance and effect, the judgment operated against them jointly, conforming to the declaration and the verdict. In Hampton

vs. Rouse, 13 Wall., 187, 20 L. Ed., 593, the verdict was jointly against two defendants, but the judgment was in form against the one who brought the case up. The reporter states that the Court held this a mere clerical error. The writ of error was dismissed for the non-joinder of the other defendant."

Besides, Price and Ayres were sued jointly, as individuals in an action of trespass or tort, and not as co-partners in a contract. They each defended as to all the land sued for. Whether the judgment was in terms against them jointly, or against the two, or against each severally, its effect and the result were the same. The verdict found Polsdorfer and wife were entitled as against both and each to all the land. And when the judgment in words expressed the recovery as against them severally for the whole, it merely simplified, according to the fact, what had been done, namely, Polsdorfer and wife receovered severally from each, and therefore, from both, the land sued for. In every case of tort or trespass, the judgment of recovery, unless otherwise expressed in it, is joint and several, against each defendant found liable.

2 Black on Judgments, Sec. 777.

And this Court has held that a judgment on a cause of action arising out of a contract merely joint of several persons, against one of the several, at common law, merges the entire cause of action, and bars an action against the others.

Mason vs. Eldred, 6 Wallace, 231.

We are not aware of any change in the common law as to the extent of the liability of persons guilty jointly of torts or trespasses, or in judgments against several, in actions based on them, by statute in Tennessee. And the authorities agree that there is such privity between the defendants in a judgment in an action based on a tort or

a trespass that satisfaction of such judgment as to one of the defendants, is a satisfaction as to all, and is a bar to an action against the other tort feasors or trespassers, jointly liable with the defendant making the satisfaction, but not parties to the judgment.

Lovejoy vs. Murray, 3 Wallace, 10-17.

These principles furnish additional reasons why Ayres should have joined Price in his writ of error, or should have given him notice of it, and should not have ignored him.

ON THE MERITS OF THE CASE AS PRESENTED IN THE CIRCUIT COURT.

Perhaps we should not entirely ignore the learned and labored argument presented in this Court by counsel on behalf of the plaintiff in error, on what he seems to consider the merits of the case of the plaintiff in error in the Circuit Court, though it seems to us to undertake an answer is a mere waste of time.

We call attention to a few undisputed facts in the record which we submit render any further reply unnecessary.

In the year 1837, the State of Tennessee, by Grant No. 3245, granted Wm. W. Woodfolk 5,000 acres of land, fronting along the east bank or margin of the Mississippi river, in Lauderdale county, Tennessee, 640 poles, or nearly two miles, and making that river the west boundary of the tract. (Record, pp. 13-14.)

There were other smaller similar grants fronting along the river, but they are not material here, as the land Ayres claims is all in front of the grant to Woodfolk.

In the year 1867, Woodfolk conveyed to Joe C. Marley (Record, pp. 15-17.)

By conveyances from Marley and those claiming under him, Polsdorfer, on the 12th of July, 1892, acquired the

title in fee to the 5,000 acres granted Woodfolk. These conveyances called for the main channel of the Mississippi river, as a boundary, and embraced all the accretions which had formed from the river between 1837, the date of the grant to Woodfolk, and the date of the conveyances to Polsdorfer. (Record, pp. 30-35.)

After he had obtained the deeds, Polsdorfer immediately took possession of the land, and he remained in possession until October 15, 1898, when he begun this suit. (Record, p. 63.)

The suit was brought under the statute of Tennessee, Shannon's Code, Sec. 4970 (3229), which provides: "Any person having a valid subsisting legal interest in real property, and a right to the immediate possession thereof, may recover the same by an action of ejectment."

The allegation in the declaration was that Polsdorfer and wife were in possession and entitled, and Ayres and others, the defendants, unlawfully and without right entered upon the lands, and falsely and unjustly set up title thereto in themselves, and cut and removed timber therefrom, and exercised acts of ownership under their false claim of title, and denied, and refused to recognize the title and the possession of Polsdorfer and wife. (Record, pp. 2-4.)

The right to maintain the suit in such a case is settled by the decisions:

Langford vs. Love, 3 Sneed, 308.

Smith vs. Lee, 1 Coldwell, 551.

Padgett vs. Baker, 1 Tennessee Chy., 222.

West vs. Lanier, 9 Humphreys, 762.

The declaration described the lands as situated in Lauderdale county, Tennessee, and the territorial jurisdiction of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, in which

the suit was brought, is bounded by the thread of the main channel of the Mississippi river, fixed by the Constitution of the State of Arkansas, and the Constitution and statutes of the State of Tennessee, respectively, as the boundary between the two States.

Constitution of Tennessee of 1796, Art. 1, Secs. 29 and 31.

Constitution of 1834, Art. 1, Secs. 29 and 31.

Constitution of 1870, Art. 1, Secs. 29 and 31.

Shannon's Code, Sec. 80 (69.)

Constitution of Arkansas of 1836, Art. 1.

Constitution of 1861, Art. 1.

Constitution of 1864, Art. 1.

Constitution of 1868, Art. 2.

Constitution of 1874, Art. 1.

And before the treaty of 1803, by which the French Republic ceded the Louisiana Territory to the United States, the thread of the main channel of the river had formed the boundary line, first between Spain and the American Colonies and States, and afterwards between them and France.

In his pleas, Ayres did not deny the local jurisdiction of the Court, nor dispute the allegation in the declaration that the land sued for was situated in Lauderdale county, Tennessee. He pleaded only, (1) not guilty, and (2) the Statute of Limitations of seven (7) years. (Record, p. 7.)

Statutes of Tennessee provide as follows:

"The defendant may plead that he is not guilty of unlawfully withholding the premises claimed by the plaintiff, and upon such plea may avail himself of all legal defenses."

Shannon's Code, Sec. 4980 (3239.)

"Such plea admits that the defendant is in possession

of the premises sued for, unless he states distinctly upon the record the extent of his possession."

Shannon's Code, Sec. 4981 (3240.)

"All allegations in the declaration, not denied in the plea, shall be taken as true for all the purposes of that issue."

Shannon's Code, Sec. 4631 (2910.)

And see: Lee vs. Slatterly, 7 Baxter, 235.

Ayres therefore admitted the locality of the premises sued for, and the jurisriction of the Court to try the title to them.

It is not disputed in the record anywhere that the land sued for is on the east or Tennessee side of the thread or main channel of the Mississippi river, and is immediately in front of, and attached to the river front of the 5,000 acres granted to Woodfolk by the State of Tennessee, in the grant of 1837. It is so located and situated that, if detached or separated from that 5,000 acres, as it was in 1837, when the grant to Woodfolk was made, and the river bank as it was then is made the boundary of the 5,000 acres, no part of such 5,000 acres would front upon or touch the margin of the river or water line as it is now, but it would be cut off and excluded from access or approach to the river by the formation or accretion in front of it, constituting the land sued for, of from a half mile to two miles in width or extent.

Neither has the State of Arkansas ever in fact exercised jurisdiction or claimed sovereignty over the land sued for. The only pretext set up by Ayres as the exercise of such jurisdiction, or claim of sovereignty on the part of that State, consists in the isolated fact that its revenue officers undertook to assess certain lands for taxation, and levy and collect taxes on them, naming them as parts of certain sections, designated as in a certain township and

range, conforming to the public surveys of the United States, and to sell such lands, so described, for the non-payment of such taxes, and then to make the deeds under which Ayres claims, to the purchasers at such sales. (Record, pp. 145, 152 and 155.)

The State of Arkansas, however, did no act to fix the location of the lands its revenue officers undertook to sell and convey, and at no time attempted to put Ayres or any one in possession under the sales and purchases.

The first deed was made by McVeigh, as Commissioner in Chancery for the Circuit Court of Mississippi county Arkansas, under a sale pursuant to a decree of that Court, in a suit by the State and Mississippi county, brought *in rem* against certain lands on which taxes were alleged to be due. The lands were described in that deed as lying in Mississippi county, Arkansas, and as all of Section 17, T. 12, R. 12 E., 122 acres; all of Section 18, T. 12, R. 12 E., 35 acres; all of Section 19, T. 12, R. 12 E., 81 acres; and all of Section 20, T. 12, R. 12 E., 18 acres—in all 256 acres, and the purchase price was $8.74. The sale was made at Osceola, Ark., on the 4th day of February, 1883, and the deed was dated the 22d of July, 1884. (Record, pp. 145-146.)

The other deeds, four in number, were all made by the Clerk of the County Court of Mississippi county, Arkansas, and dated the 30th of June, 1897, under sales to pay taxes levied by the State of Arkansas and Mississippi county for the year 1894. Ayres was the purchaser at the sales. One deed conveyed him all Section 20, T. 12 N., R. 12 E., 18 acres, for the taxes, penalty and costs, amounting to $1.17. (Record, p. 152.) Another conveyed him Section 17, being 35 acres; another Section 18, being 81 acres, and the last Section 19, being 122 acres, each for the taxes, penalty and costs due on it. (Record, p. 155.)

The deeds stated were the only sources of title relied on by Ayres. (Record, pp. 219-220.)

Under these deeds, Ayres claimed all the accretions up to the original bank, or bank in the year 1837, of the Mississippi river, in Tennessee, around the original Flower Island, as he termed the island in the Mississippi river, and running up the river along the Tennessee side, from Fort Pillow to Plum Point, about thirteen (13) miles. (Record, pp. 223 and 226-227.)

Ayres introduced in evidence two patents from the United States, and a map of the survey of the lands from the General Land Office of the United States, made on the 3d day of March, 1825, being a map and survey of fractional Sections 17, 18, 19 and 20, Township 12 North, Range 12 East.

The first patent is dated February 1, 1843, and was based upon an entry at United States Land Office, at Helena, Arkansas. It showed that D. Hardiman had made payment under the Act of Congress for fractional Section 18 and fractional Section 17 (on island), in Township 12 North, Range 12 East, in the district of lands subject to sale at Helena, Ark., containing 158.01 acres, according to the official plat of the survey of the land returned to the General Land Office, and therefore the United States conveyed him the lands.

The other patent was dated on the 12th day of March, 1847, (mistake in Record says 1857.) This patent recited payment by John C. Barnes, under the Act of Congress for fractional sections 19 and 20 (on island), in Township 12 North, Range 12 East, in the district of lands subject to sale at Helena, Ark., containing 99.70 acres, according to the official plat of the survey returned to the General Land Office, and therefore the United States conveyed him those lands by the descriptions stated. (Record, pp. 229-231.)

The patents established (1) that the lands patented were on the west, or Arkansas side of the thread of the main channel of the Mississippi river, and that the stream was between the island on which the lands were and the Tennessee shore, and (2) that the lands and the island were not in the State of Tennessee, nor any part of its territory. These facts are true, because the United States in acquiring the Louisiana Territory in that locality and far above and below that point on the Mississippi river, acquired jurisdiction and title only to the thread of the main channel of the Mississippi river, the jurisdiction and title to the lands on the other side of such thread having been, from the settlement of the thirteen (13) Colonies, in North Carolina, and afterward in Tennessee. And it is a well-known fact that North Carolina and Tennessee owned and granted all the lands bordering the Mississippi river on its east side, within the limits of the present State of Tennessee, except a few miles just south of Memphis, in Shelby county, where there was a mistake in the line between Tennessee and Mississippi, and the lands were surveyed and portions sold by the United States before the mistake in the line was rectified. These titles have been recognized and the territory or district is known as "The Strip."

All the witnesses agree that there is not now, and has not been for many years, any island on the Arkansas side of the thread of the main channel of the Mississippi river corresponding with, or answering the description of the island containing the lands the United States patented to Hardiman and Barnes. And all of them agree that the main channel of the Mississippi river, so far as they have known or observed it, has always been to the westward of the lands in controversy in this suit, or between those lands and the Arkansas shore.

Tennessee has always claimed sovereignty and exercised jurisdiction over the land, the 5,000 acres originally granted to Woodfolk, and all the accretions thereto, including the lands in controversy, in this suit, and such accretions and lands in controversy, are all between the original Tennessee shore, or east bank of the Mississippi river in the year 1837, and the thread of the main stream or channel of that river. The island on which the lands patented to Hardiman and Barnes were located commenced to wash away, and a mud bar to form on the Tennessee shore across the main channel from the island, probably as early as 1839. The formation or accretion to that shore continued until it reached its present proportions, the Mississippi river being all the time between it and the opposite Arkansas shore. The island probably disappeared as early as the year 1850, or before that time, being washed away by the river. (Record, pp. 70-87, and pp. 119-124.)

And as the accretion was added and became a part of the Tennessee shore, the land thus acquired was treated as the other land on the bank of the river, and a part of the State. The lands were assessed for taxation, and the taxes paid. (Record, pp. 68, 43 and 140.)

Suits were brought with respect to the possession of the land, and process executed upon it. (Record, pp. 140 and 45-48.)

Assuming that the accretions belonged to the State of Tennessee and not to the riparian owners, the State in the year 1894, made two grants of portions of them, and including the land in controversy, or a part of it, one to Thomas Price, one of the defendants, and the other to T. A. and E. J. Roy, two others of the defendants. (Record, pp. 114-117.)

Aside from the position that Ayres, in this suit, upon his plea, is not entitled to raise, or have the benefit of any

question of State boundary, or question whether the premises are or ever were a part of the territory of, or within the State of Arkansas, or subject to its disposition, the fact that the State of Tennessee is in possession, and is in the exercise of sovereignty and jurisdiction over the land sued for, is conclusive of those questions for the purposes of the present suit. This Court alone, in an original suit, between Arkansas and Tennessee as States, has jurisdiction of the question of boundary. It cannot be settled by judicial determination in this suit between Ayres and Polsdorfer. For the purposes of this suit the land is in Tennessee, and no question as to that fact can be tried before any jury in the course of it. The question is not judicial, but political, and the Courts must follow what the States respectively, or those who represent them in their legislative and executive departments, establish or acquiesce in, with respect to the fact of actual possession, or occupation, and sovereignty and jurisdiction.

Jones vs. United States, 137 U. S., 212, etc.

If the fact be conceded that the premises in controversy occupy in part or wholly the position or locality of the island which has been washed away, on which the lands patented to Barnes and Hardiman by the United States, or the lands described in Ayres' tax deeds at one time, were situated, or if the locality of such premises was in fact at one time in the State of Arkansas, yet if it is true that by the recession of the Mississippi river, or the accretion from it to the Tennessee shore, the thread of the main channel of the river has been so diverted and changed that such thread is now to the west of that locality, namely, the former island, and the change has placed in Tennessee what was in Arkansas, that is to say, if such locality, with reference to the thread of the stream, is now on the east side of it, or toward the original Tennessee shore, then such

locality or the premises in controversy are in Tennessee, the same as if there had never been any change of the thread of the stream, and as if they had never been in Arkansas.

Nebraska vs. Iowa, 143 U. S., 359.

Iowa vs. Illinois, 147 U. S., 1.

Keokuk & Hamilton Bridge Co. vs. Illinois, 175 U. S., 626.

In Arkansas, it has been decided that if the Mississippi river washes an island away, and the locality becomes a part of the bed of the river, the title of the former owner is thereby extinguished, and the ground under the water becomes the property of the State of Arkansas, in trust for the public, the same as the rest of the bed of the river, and if, years afterwards, land forms or reappears above the water, at the place where the original island was, such land does not become the property of the owner of the land at the time the island was washed away, or of those claiming under him, or the private property of any one, but remains the public property, and vested in the State in trust for the public.

Wallace vs. Driver, 61 Ark., 429.

The fact is admitted by Ayres, and his whole defense is based on it, that the land he claims was at one time west of the thread of the main channel of the Mississippi river, and in Arkansas, and his position in this suit is that he can hold such land now, when the thread of the stream has so changed that the land is east of it, and in the State of Tennessee. His position further is that although the United States only patented Hardiman and Barnes together 257.71 acres, and the land patented consituted an island, but a few hundred yards in length or width, on the Arkansas side of the thread of the main channel of the Mississippi river, and his purchase at the sales for taxes only

embraced in terms the same lands, and the same island, and the same area that Hardiman and Barnes acquired, he can hold as his, the island, or the land, that is the premises on the Tennessee shore, sued for in this action, though they are now on the east or Tennessee side of the thread of the main channel of the river, and are joined to, and form a part of the Tennessee main land, and though they extend along the Mississippi river many miles, and far above, and far below, on the river, the original island patented to Hardeman and Barnes, and sold and purchased at the sales for taxes under which he claims.

In St. Louis vs. Rutz, 138 U. S., 236, this Court decided:

(1) The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river as such riparian proprietors.

(2) The law of title by accretion can have no application to a movable island, traveling for more than a mile, and from one State to another, for its progress is not *imperceptible*, in a legal sense.

138 U. S., 250-251.

Admitting these propositions, Ayres has, it seems to us, nothing to stand on in this case.

We have already called attention to the fact that Polsdorfer and wife were in possession of the premises involved in this suit, at the beginning of the suit, and that they sued, under the Statute of Tennessee, for the unlawful interference by Ayres with their possession and title. The suit is somewhat similar to West vs. Lanier, 9 Humphreys, 762, which was decided before the statute referred to above was enacted.

The jury by its verdict has found the possession to be in Polsdorfer and wife.

Conceding that Polsdorfer's possession did not give him a perfect legal title, it did give him a sufficient title to maintain this suit against Ayres, if the fact appears in the record, as we submit it does, that Ayres showed by the pleadings and proof no title, and no substantial claim of title in himself to the land, or to any part of it. He made no claim under a grant from North Carolina or Tennessee, or any one claiming under either of those States. He sets up a claim of title only under the sales for taxes in the State of Arkansas and the deeds based thereon, and the lands are not, and never were in the State or Arkansas or subject to its jurisdiction.

In Christy vs. Scott, 14 Howard, 282, this Court decided that "a mere intruder cannot enter on a person seized, eject him, and when sued, question his title, or set up any outstanding title in another. The prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title."

And in Burt vs. Panjaud, 99 U. S., 180, it was decided that "in ejectment, or trespass, *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor prior to his eviction is *prima facie* evidence of title, on which he can recover against a mere trespasser."

The cases were reviewed, and the rule announced again in Sabriego vs. Maverick, 124 U. S., 261, 296-297.

The cases in Tennessee are to the same effect.

Garners Lessee vs. Johnston, Pecks R. 24.

Swan vs. Castleman, 4 Baxter, 257.

The State of Arkansas, as the Court below, and this Court judicially know, was incapable by law of granting the land in controversy, situate in Tennessee, and under the actual exercise of its jurisdiction, and therefore the deeds purporting to be made upon the sales for taxes, levied under the assumed authority of that State, were properly

disregarded, and treated as void on the trial in the Circuit Court.

United States vs. Reynes, 9 Howard, 127.
Kennett vs. Chambers, 14 Howard, 38, 50.
Hoyt vs. Russell, 117 U. S., 401.
Coffee vs. Groover, 123 U. S., 1.
Deffeback vs. Hawke, 115 U. S., 392.
Redfield vs. Parkes, 132 U. S., 239, 250-251.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
For Polsdorfer and Wife.

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JAMES H. McKENNEY,
Clerk.

Motion to be allowed to furnish

16 Copies of record.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed May 3, 1901.

No. 654.

E. M. AYRES, PLAINTIFF IN ERROR,

vs.

J. H. POLSDORFER ET UX.

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Counsel for Plaintiff in Error.

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(18,139.)

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 654.

E. M. AYRES, PLAINTIFF IN ERROR,

vs.

J. H. POLSDORFER AND WIFE, LOUISA POLSDORFER, DEFENDANTS IN ERROR.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of E. M. Ayres, plaintiff in error in the above-styled cause, most respectfully shows to the court that he has obtained from one of the justices of the honorable court a writ of error to the United States circuit court of appeals, sixth circuit. Your petitioner is informed by the clerk of this court that there must be twenty-five printed copies of the transcript of the record of the case for the use of this court.

Petitioner can procure sixteen printed copies of the transcript of the record used in the court of appeals aforesaid. He begs the court to be allowed to furnish those sixteen

copies, in order that they may be by the clerk of this court supplemented by what transpired in said court of appeals, and that these sixteen copies thus supplemented be accepted by the court instead of requiring the plaintiff in error to print twenty-five copies of the whole record. The supplemental matter will comprise only a few printed pages, and the printed transcript in the court of appeals comprises 278 pages.

E. M. Ayres,
By C. W. Heiskell, *Attorney.*
Thos. B. Turley, *Attorney.*

[Endorsed:] File No., 18,139. Supreme Court U. S., October term, 1900. Term No., 654. E. M. Ayres, pl'ff in error, *vs.* J. H. Polsdorfer *et ux.* Motion of plaintiff in error that he be allowed to furnish 16 printed copies of record in circuit court of appeals. Office Supreme Court U. S. Filed May 3, 1901. James H. McKenney, clerk.

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Supreme Court of the United States.

No. 89.—October Term, 1902.

E. M. Ayres, Plaintiff in Error,
vs.
John H. Polsdorfer and wife, Louisa M. Polsdorfer.

In error to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 5, 1903.]

Ejectment and trespass brought in the Circuit Court of the United States, Western Division of the Western District of Tennessee, for the recovery of lands and damages. Part of the land is an island in the Mississippi River. The declaration was in the usual form, and the ground of jurisdiction in the Circuit Court was diversity of citizenship, expressed as follows:

"The plaintiffs, who are citizens of the State of Indiana, residing at Evansville, therein, complain of the defendants, Joe C. Marley, Thomas Price, E. J. Roy, T. A. Roy, L. R. Coleman and E. M. Ayers, who are citizens of the State of Tennessee, residing in the Western Division of the Western District thereof, in an action of trespass and ejectment."

The declaration alleged ownership in fee of the plaintiffs (defendants in error here) and their possession, and alleged the entry of the defendants as follows:

"And the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to wit, on the said October 1st, 1898, at the said county of Lauderdale, unlawfully and without right entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do."

Judgment for the recovery of the land was prayed and $3,000 damages.

Price pleaded not guilty. The plaintiff in error also pleaded not guilty, and "that plaintiff's action accrued more than seven years before suit brought." Against the other defendants no judgment was sought.

Upon the issues thus joined the jury found for the plaintiffs (defendants in error) as follows:

"That they find that the plaintiffs are the owners in fee and entitled to and in possession of the following lands, situated in Lauderdale County, Tennessee, to wit: . . ."

They also further found—

"That the plaintiffs are the owners in fee, and entitled to all the accretions and alluvion formed by the Mississippi River in front of the said

three (3) tracts of land above described, the same being and constituting all the land added by accretion and alluvion to the river front, as such front of the said three tracts of land existed on the Mississippi River when the said tracts of land respectively were granted, and extending from and including all the accretions and alluvion in front thereof, from the line on the river of the tract first mentioned above, furthest up stream.

* * * * * *

"As to the other land herein sued for not embraced in the above descriptions, the jury finds the plaintiffs are not entitled to the same."

Judgment was entered in accordance with the verdict. To this judgment plaintiff in error sued out a writ of error from the Circuit Court of Appeals of the Sixth Circuit, which was dismissed upon the motion of defendant in error, on the ground that there had been no summons and severance of the defendant Thomas Price. (105 Fed. Rep. 737.) A petition for rehearing was filed but denied. This writ of error was then sued out.

The assignments of error are as follows:

"1. The court erred in dismissing the writ of error of petitioner upon the ground that the judgment was against two jointly, and that they did not join in the appeal.

"2. The court erred in dismissing the petition for rehearing made by this petitioner.

"In support of this assignment he submits herewith counsel's brief No. 2.

"3. The court erred in refusing to entertain jurisdiction of this cause and not reversing it upon the merits. And in support of this he refers to the assignment of error Record pp. 266, 273 and submits herewith his counsel's brief thereon No. 3.

"The ground of this application is that the record in this cause shows that petitioner claimed under muniments of title from the State of Arkansas and Polsdorfer and wife and also Price claimed under muniments of title from the State of Tennessee. In other words, petitioner claims that he has a right to the writ of error under the Constitution of the United States, article 3, section 2."

Mr. Justice McKenna delivered the opinion of the Court.

A motion is made to dismiss on the ground that the judgment of the Circuit Court of Appeals was final, and therefore it is not reviewable by writ of error from this court.

Interpreting the Judiciary Act of 1891, we said, in *McLish* v. *Roff*, (141 U. S. 661, 666,) that its purpose was to provide "for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the United States and the Circuit Courts of Appeals, by designating respectively the classes of cases in respect to which each of those two courts shall respectively have final jurisdiction."

But special questions arose. It was provided in section 6 that the judgments and decrees of the Circuit Court of Appeals should be final in all

cases in which *jurisdiction* was dependent entirely upon diversity of citizenship. What jurisdiction was meant and what would be the effect if Federal questions should appear in the proceedings after the commencement of the case? The questions were answered in *Colorado Mining Co.* v. *Turck,* (150 U. S. 138.)

In that case the jurisdiction of the Circuit Court was invoked on the ground of diversity of citizenship, but the defendant claimed to have set up in defense a Federal question arising under section 2322 of the Revised Statutes of the United States, and on that ground insisted that the judgment of the Circuit Court of Appeals in the case was not final. Rejecting the contention and dismissing the writ of error, this court held that before the defense under section 2322 of the Revised Statutes had been set up jurisdiction had "already attached, and could not be affected by subsequent developments." Jurisdiction, it was said, "depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred." The same idea was expressed in subsequent cases though in somewhat different language. But a distinction was not precisely made between the questions embraced in section 5 and other Federal questions. That distinction was presented in *Loeb* v. *Columbia Township Trustees,* (179 U. S. 47.)

The case was an action upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits. There was a demurrer to the petition, and it appeared from the opinion of the court that one of the points raised on the demurrer was that the act of the general assembly, under and by virtue of which the bonds were issued, contravened the Constitution of the United States, and therefore the bonds were void. The case came directly from the Circuit Court to this court. A motion was made to dismiss for want of jurisdiction. The motion was denied, notwithstanding the petition in the Circuit Court showed that the parties were citizens of different States and stated no other grounds of jurisdiction. If nothing more appeared, it was said, bearing upon jurisdiction, "it would be held that this court was without authority to review the judgment of the Circuit Court." But as we have seen, the claim had been made in the Circuit Court by the defendant that the statute of Ohio, by the authority of which the bonds were issued, was in contravention of the Constitution of the United States. It was contended that such claim made by the defendant was not sufficient to give this court jurisdiction, upon a writ of error, to review the final judgment of the Circuit Court sustaining such claim. It was answered, "such an interpretation of the fifth section is not justified by its words. Our right to review, by the express words of the statute, extends to 'any case' of the kind specified in the fifth section." And this view was affirmed in *Huguely Manufacturing Company* v. *Colton Cotton Mills,* (184 U. S. 290.)

In *Robinson* v. *Caldwell*, (165 U. S. 359,) it had been decided that "it was not the intention of the Judiciary Act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits, both in this court and in the Circuit Court of Appeals." This was affirmed in *Loeb* v. *Columbia Township Trustees*. It was there observed that the plaintiff in that action could have carried the case to the Circuit Court of Appeals, but had he done so, "he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the Circuit Court."

Therefore when the jurisdiction of the Circuit Court is invoked solely on the ground of diversity of citizenship two classes of cases can arise, one in which the questions expressed in section 5 appear in the course of the proceedings and one in which other Federal questions appear. Cases of the first class may be brought to this court directly or may be taken to the Circuit Court of Appeals. But if taken to the latter court they cannot then be brought here. Cases of the second class must be taken to the Circuit Court of Appeals and its judgment will be final. The case at bar falls under one or under the other of those classes.

The declaration was ejectment and trespass in the form used in the local practice. The only ground of jurisdiction was that the plaintiffs were citizens of the State of Indiana, and the defendants were citizens of the State of Tennessee. The answers were simply traverses in statutory form of the wrongs alleged in the declaration. The plaintiffs in the case recovered, and the plaintiffs in error here carried the case to the Circuit Court of Appeals. The Federal question arose in the course of the proceedings in the Circuit Court, and is claimed to have been and to be based on grants of lands from different States, the conflict arising between grants from the State of Tennessee to defendants in error and to Price, under which they respectively claimed title, and a tax deed introduced in evidence by plaintiff in error, which was made by the officials of Mississippi County, Arkansas, and under which deed he claimed title. Granting, for argument sake, there was an opposition of grants within the meaning of the provision of the Constitution defining the judicial power of the United States, it would seem to bring the case within the doctrine of *Loeb* v. *Columbia Township Trustees*, both as to the question raised and the manner of its review, and the plaintiff in error, having sued out a writ of error from the Circuit Court of Appeals, cannot now come to this court upon another. The plaintiff in error, however, denies that this consequence results from *Loeb* v. *Columbia Township Trustees*, and insists that the principle of the case justifies the present writ of error. The argument is that, when a Federal question not embraced in section 5 is disclosed by defendant's plea, or by subsequent proceedings, and there is judgment against the defendant, if he

be denied the right to carry the case from the Circuit Court of Appeals to this court, that the "result would be contrary to the principle laid down in *Loeb* v. *Columbia Township Trustees.*" And it is insisted "there are cases of Federal jurisdiction which are not embraced under section 5 of the act of 1891, in which the judgment or decree of the Circuit Court of Appeals is not final under section 6 of said act;" and *Northern Pacific Railway Co.* v. *Amato*, (144 U. S. 471,) and *Union Pacific Railway Co.* v. *Harris*, (156 U. S. 326,) are cited as examples. It is said that "in these [those] cases the declaration or complaints disclosed that the original jurisdiction of the Circuit Court was invoked on account of diverse citizenship, but they further disclosed that the defendants were corporations organized under the laws of the United States." It is then asked:

"Suppose a ground of Federal jurisdiction not embraced in section 5 of the act of 1891, and in which the judgment or decree of the Circuit Court of Appeals is not conclusive, is first disclosed by defendant's plea, or by subsequent proceedings, in a case in which the original jurisdiction of the Circuit Court was invoked solely on the ground of diverse citizenship, or on one of the other grounds in which the decision of the Circuit Court of Appeals is final. If, in such case, there was a judgment against the defendant, and he carried the case by writ of error or appeal to the Circuit Court of Appeals, and judgment was there rendered against him, and he then sought to bring the case to this court by writ of error or appeal, how would it stand in this court?"

Answering the question, counsel say if the doctrine of *Mining Co.* v. *Turck* be enforced, and the writ of error dismissed, the result would be that "wherever a case involved two grounds of Federal jurisdiction, neither of which is embraced in section 5 of the act of 1891, and as to one of which the judgment or decree of the Circuit Court of Appeals is final, and as to the other is not final, then the plaintiff suing in the Circuit Court can, by invoking its jurisdiction solely on the ground as to which the judgment or decree of the Circuit Court of Appeals will be final, deprive the defendant of the right given him to carry the case from the Circuit Court of Appeals to this court by writ of error or appeal. Such a result would be contrary to the principle laid down in *Loeb* v. *Columbia Township Trustees*, *supra*, which case, it will be seen, discountenances the idea that one party can, by the method or way in which he brings his suit, deprive the other of a right of review by this court."

We have quoted at length from counsel to exhibit their contention in full. The contention has been answered by that which we have already said. Besides, counsel are wrong in their premises. *Northern Pacific Railway Co.* v. *Amato* and *Union Pacific Railway Co.* v. *Harris* were not cases in which the jurisdiction was invoked on the grounds of diversity of citizenship. The first was brought in a State court and removed to the Circuit Court of the United States, on the ground that being a case against a corporation created by Congress, the suit arose under a law of the United

States. The other case was brought in the Circuit Court of the United States and the Federal character of the corporation, following previous authority, was held to have constituted a ground of jurisdiction independent of the citizenship of the parties. We questioned the consistency of the reasoning upon which the conclusion was based, but recognized and yielded to authority, and we assigned the case to that class of cases which was not dependent solely upon diversity of citizenship.

Loeb v. *Columbia Township Trustees* does not hold broadly that the plaintiff, "by the method or way in which he brings his suit," can "deprive the other of a right to review by this court." It only denies the right of review of the merits in this court and in the Circuit Court of Appeals, and the limitation is reasonable considering the purpose of the statute. Its purpose was undoubtedly to hasten the results of litigation and to relieve this court of its burden of cases. This could only be accomplished through the medium of another appellate tribunal. And of what cases it should have jurisdiction and its relation to this court, was naturally expressed in general language. Interpretation, as we have said, was soon demanded and responded to, and the appellate power of this court and that of the Circuit Court of Appeals definitely assigned. If the assignment leaves some cases unreviewable by this court, it, by that very effect, fulfills the purpose of the act of 1891. Against the assignment reasons of course may be urged, and counsel has seen and forcefully presented them.

Another argument is used by plaintiff in error to bring this case within *Northern Pacific Railway Co.* v. *Amato*, *Union Pacific Railway Co.* v. *Harris*, and *Loeb* v. *Columbia Township*. It is, that the Federal question raised, to wit, the claim of grants under different States, does not involve the construction or application of the Constitution of the United States, and therefore is not within that clause of section 5 which provides for appeal or writ of error direct to this court. To so hold, it is claimed, would make all the other divisions of section 5 but nominal, and make all the cases arising under them involve the construction of the Constitution of the United States. That, it is claimed, was not the purpose of the section, "upon the familiar principle that the enumeration of six particular classes is a limitation upon the scope and effect of each particular class."

That clause, therefore, it is finally said, does not embrace the cases included in the other clauses. And extending the argument, it is further said:

"It does not embrace cases of diverse citizenship, nor cases between citizens of the United States and aliens, nor patent cases, nor revenue cases, in which the United States is a party, nor criminal cases involving a crime less than capital or infamous, nor admiralty cases, for all these cases are provided for in section 6 of said act.

"The Constitution of the United States gives the courts of the United States jurisdiction in cases between citizens of different States, and between citizens of the same State, claiming lands under grants from different States.

"If 'the construction or application of the Constitution of the United States,' as used in section 5 of the act of 1891, does not embrace cases between citizens of different States, upon what ground can it be said to embrace cases between citizens of the same State claiming under grants of different States?

* * * * * *

"Parties claiming under grants from different States are allowed to come into the Federal court in order to obtain an impartial trial. The question as to the validity of the grants we may say never depended upon any construction of the Constitution of the United States. Hence it is, we insist, that not being enumerated specifically in section 5 of the act of 1891, cases of parties claiming under grants of different States are not embraced therein, nor are they embraced in the classes of cases enumerated in section 6 of the act of 1891, in which the judgment and decree of the Circuit Court of Appeals is final. If we are right in this the result is that the writ of error should be maintained, it being sufficient under the case of *Loeb* v. *Columbia Township Trustees* that the question appears definitely elsewhere in the record."

The contention seems to be opposed to the assignments of error. The third assignment of error is "that the record in this cause shows that petitioner claimed under muniments of title from the State of Arkansas and Polsdorfer and wife and also Price claimed under muniments of title from the State of Tennessee. In other words, petitioner claims that he has a right to the writ of error under the Constitution of the United States, article 3, section 2."

But we may pass that, as we are not called upon to concede or deny that a case in which conflicting grants from different States to citizens of different States appear is one arising under the Constitution of the United States. If it be such a case it should be brought here directly from the Circuit Court, and *Loeb* v. *Columbia Township Trustees* applies. If it be not such a case, the other cases which we have cited apply. There is nothing to the contrary in *Northern Pacific Railway Co.* v. *Amato* or *Union Pacific Railway Co.* v. *Harris*. In such cases it always appears at the outset that one of the parties is a Federal corporation.

The final contention of plaintiff in error is that the principle of *Mining Co.* v. *Turck*, and kindred cases, is based "to a great extent on the doctrine that the act of 1891 was not intended to give a party, defeated in the Circuit Court, the right to have his case determined upon its merits both in this court and in the Circuit Court of Appeals." And that "plaintiff in error has had no trial on the merits in the Circuit Court of Appeals or in this court." This is claimed because the Circuit Court of Appeals dismissed the case on the ground that Price, who was a defendant in the Circuit Court, was not made a party to the writ of error, nor as to him had there been summons and severance.

That the ruling was error we are not called upon to say. Granting it to have been error, we are powerless to review it. The expression as to the determination of a case "upon its merits" was used in distinction to the review of a question of jurisdiction, strictly so called—the right of the Circuit Court to entertain the case at all. As to such questions, other rules apply than those we have expressed in this opinion. It was not intended to decide that the Circuit Court of Appeals must hear the case on the merits in the broad sense of that expression, disregarding every error committed in seeking a review by that court. Nor was it intended to deprive that court of the power to determine whether the conditions of its right to review the case had been properly observed.

It follows that the writ of error must be dismissed.

Apparently apprehending this result, plaintiff in error applied at the hearing on motion and petition filed October 9, 1902, for the writ of certiorari as under section 6 of the act of March 3, 1891.

Judgment was entered below December 7, 1900, and petition for rehearing denied February 23, 1901. This writ of error was brought April 15, 1901, and the record filed here and the cause docketed April 29, 1901.

In these circumstances we must decline to entertain the application.

Motion for certiorari denied. Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.